150 U.S. 138

AGREED RECORD, CASE No. 15,319.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No, 935.

THE COLORADO CENTRAL CONSOLIDATED MINING COMPANY, PLAINTIFF IN ERROR,

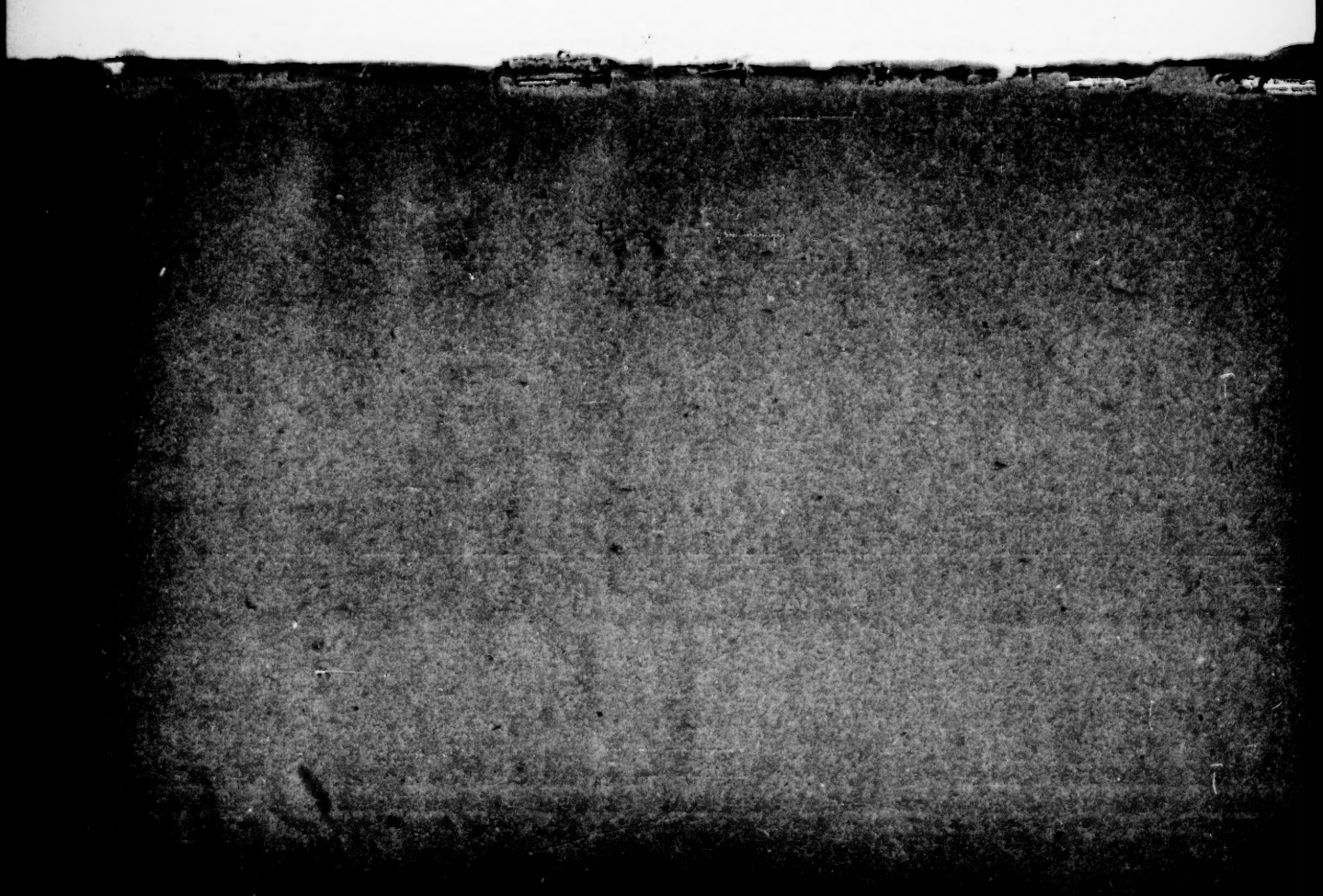
vs.

JOHN TURCK.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

RECORD FILED MAY 16, 1893.

AGREED RECORD FILED SEPTEMBER 6, 1893.



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a UNITED STATES OF AMERICA, *ss:*

In the Supreme Court.

COLORADO CENTRAL CONSOLIDATED MINING COMPANY, Plaintiff in Error, *v.* JOHN TURCK, Defendant in Error.	Writ of Error to Circuit Court of Appeals for the Eighth Circuit.

Stipulation.

It is hereby stipulated, said court consenting thereto, that, owing to the size of the record in this court, the motion to dismiss or affirm the judgment of the said circuit court of appeals about to be made by defendant in error may be heard upon, and also that final argument may be heard upon a printed portion of said record as follows, to wit:

1. The entire record upon which the case was heard and decided by the circuit court of appeals, being 104 pages, hereto attached, marked "A."

2. The statement of the case and opinion of the circuit court of appeals of May 9, 1892, found at pages 889 to 897 of vol. 50 Federal Reporter, hereto attached, marked "B."

3. The judgment of the United States circuit court of appeals, hereto attached, marked "B."

4. Petition for rehearing filed in the circuit court of appeals, hereto attached, marked "C;" the extracts of testimony of the witnesses Chase and Paige contained in which shall be treated as part of the record.

5. The opinion of the said court upon denying said rehearing, found on pages 263 to 267 of vol. 54 Federal Reporter, hereto attached, marked "D."

b 6. Petition for writ of error, writ of error, and allowance of writ and assignment of errors in this court, hereto attached, marked "E," "F," and "G."

7. It is further stipulated that in the argument either party may refer to any part of the record in this case and may in printed argument or brief quote any part of the record in this court, whether printed or not, which he deems necessary to a proper presentation of his case, giving page or folio of the original record filed in this cause, and such parts of the record so quoted in the briefs may be considered by this court, if the court holds that the motion is to be heard on record other than that in the circuit court of appeals, the same as though printed in the record herein provided for.

8. It is stipulated that writ of error and citation has been issued and served in due form and within due time.

R. S. MORRISON,
Attorney for Plaintiff in Error.
WILLARD TELLER,
Attorney for Defendant in Error.

c "A."

United States Circuit Court of Appeals, Eighth Circuit, October Term, 1891.

THE COLORADO CENTRAL CONSOLIDATED MINING COMPANY, Plaintiff in Error,
vs.
JOHN TURCK, Defendant in Error.
No. 42.

In error to the circuit court of the United States for the district of Colorado.

Filed November 7th, 1891.

1 Pleas in the Circuit Court of the United States for the District of Colorado, Sitting at Denver.

United States Circuit Court of Appeals for the Eighth Circuit.

Error to the circuit court of the United States, district of Colorado.

THE COLORADO CENTRAL CONSOLIDATED MINING COMPANY, Plaintiff in Error,
vs.
JOHN TURCK, Defendant in Error.

It is hereby stipulated by the parties, in accordance with rule 23 of the rules of said court of appeals, that parts only of the record shall be printed, and the cause may be heard on the parts so printed, to wit:

The placita, complaint, amendment to complaint, answer, representation, verdict, overruling motion for new trial and ruling thereon, the testimony of E. E. Chase for plaintiff, the testimony of Ernest Le Neve Foster for defendant, the testimony of Frank A. Maxwell on rebuttal and the consolidated testimony found on pages 654 and 665 of the transcript, the final judgment and the assignment of errors, and all the instructions given by the court and remarks of and exceptions taken by counsel, beginning at bottom of page 677 of record and ending with the word "law" near top of page 692.

TELLER & ORAHOOD,
H. M. TELLER,
For Plaintiff (Def't in Error).

P. & T. block, Denver.

R. S. MORRISON,
Att'y for Pl'ff in Error.

17 Clayton block, Denver.

U. S. circuit court of appeals, eighth circuit, 1891, October term. No. 42. Colorado Central Consolidated Mining Company, pl'ff in error, *vs.* John Turck, def't in error. Stipulation to omit from printed record, under rule 23. Filed November 7, 1891. John D. Jordan, clerk.

Be it remembered that heretofore, and on, to wit, the 2d day of December, A. D. 1885, came John Turck, by L. C. Rockwell, his attorney, and filed in said court his complaint and sued out of and under the seal of said court a writ of summons against the Colorado Central Mining Company, a corporation.

2 And the said complaint is in words and figures as follows, to wit:

Complaint.

UNITED STATES OF AMERICA, *District of Colorado,* } ss:

In the Circuit Court of the United States within and for the District of Colorado.

JOHN TURK, Plaintiff,
vs.
THE COLORADO CENTRAL CONSOLIDATED MINING COMPANY, a Corporation, Defendant.

Plaintiff for cause of action against defendant complains and alleges:

First. That plaintiff is a resident and citizen of the State of Colorado; that The Colorado Central Consolidated Mining Company, defendant, is a corporation organized and existing under and by virtue of the laws of the State of New York; that the amount in dispute in this action exceeds the sum of $500 exclusive of costs.

Second. Plaintiff further alleges that upon the first day of January, A. D. 1885, he was the owner of, seized in fee and entitled to the possession of a certain lode mining claim and premises, situate in Argentine mining district, Clear Creek county, Colorado, described as follows, to wit: The Aliunde Tunnel lode, No. 2, with all the dips, spurs, angles and variations of said lode throughout their entire length and depth, and all other lodes, veins, ledges or deposits of mineral, the top or apex of which lie inside of said Aliunde Tunnel lode, No. 2, as patented to John Turck by certain letters patent of the United States, dated the 31st day of January, A. D. 1883, which lode mining claim and premises are described in said patent as mineral entry No. 1862 in the series of the United States land office at Central City, Colorado, and designated by the surveyor general of the State of Colorado as survey lot No. 1494, which lode is fifteen hundred feet in length, by one hundred and fifty feet in width.

Third. That said Aliunde Tunnel lode, No. 2, has a pitch to the northwest of about sixty degrees from a horizontal; that the top and apex of said lode lies within the side and end lines of said Aliunde Tunnel lode, No. 2; that owing to the dip of said lode to the northwest, at a depth of about three hundred feet beneath the surface of the ground, said Aliunde Tunnel lode, No. 2, passes under the north side line of said patent and enters the land adjoining; that while plaintiff was so seized and possessed of said Aliunde

Tunnel lode, No. 2, the defendant afterwards, and on the 1st
3 day of January, A. D. 1885, wrongfully entered upon and ousted the plaintiff from about four hundred feet of said Aliunde Tunnel Lode, No. 2, mining claim and premises next hereinafter described and now wrongfully withholds the same from plaintiff, that is to say: That said defendant wrongfully ousted the plaintiff from so much of said Aliunde Tunnel Lode, No. 2, mining claim and premises as lies beneath the depth of three hundred feet beneath the surface of the ground north of the north side line of said Aliunde Tunnel lode, No. 2, carrying said north line down vertically, and from thence on the pitch of said lode northwesterly, and measuring thence along the line of said Aliunde Tunnel lode, No. 2, a distance of four hundred feet next west of the northeast end line of said claim.

Fourth. That plaintiff owns said property, mining claim and premises in fee, and now is and ever since January 1st, 1885, has been entitled to the possession thereof.

Fifth. That the value of the rents, issues and profits of said premises from said 1st day of January, 1885, while said plaintiff has been excluded therefrom by the defendants amounts to two hundred and fifty thousand dollars.

Wherefore, plaintiff demands judgment against said defendant:

1st. For the possession of the premises described from which he has been ousted; and

2d. For two hundred and fifty thousand dollars damages for the rents, issues and profits and for the ores taken out of said premises described; and

3d. For his costs of suit.

L. C. ROCKWELL,
Att'y for Pl'ff.

Indorsed: No. 1862. In the circuit court of the United States. John Turck, plaintiff, *vs.* The Colorado Central Consolidated Mining Co., defendant. Complaint. Filed Dec. 2, 1885. Edward F. Bishop, clerk. L. C. Rockwell, att'y for pl'ff.

And afterwards and on, to wit, the 16th day of March, A. D. 1886, came again the said defendant, by Messrs. Morrison and Fillius, its attorneys, and filed in said court and in said cause its answer to the complaint heretofore filed herein.

4 And the said answer is in words and figures as follows, to wit:

Answer.

UNITED STATES OF AMERICA, *ss:*

In the Circuit Court of the United States, District of Colorado.

JOHN TURCK, Plaintiff,
vs.
THE COLORADO CENTRAL CONSOLIDATED MINING COMPANY, a Corporation, Defendant.

The defendant, answering the complaint, says:

1. That whether or not the plaintiff on the first day of January, 1885, or at any time was or is now the owner of or seized in fee of or entitled to the possession of the premises described in the second paragraph of the complaint, or any part thereof, the defendant has not and cannot obtain sufficient information or knowledge upon which to base a belief, and therefore denies the allegations in said paragraph and the same allegations as repeated in paragraph four of complaint.

2. The defendant denies that the Aliunde Tunnel lode, No. 2, has a pitch to the northwest of about sixty degrees from the horizontal, and denies that it has any such or so great a departure from the perpendicular. That whether or not the top or apex of said lode lies within the side lines or end lines of said Aliunde Tunnel lode, No. 2, it has not and cannot obtain sufficient knowledge or information upon which to base a belief, and therefore denies such allegations; and it denies that owing to the dip of said lode at the depth of about 300 feet beneath the surface, or at any depth, it passes underneath the north side line of the patent to said lode. It denies that the defendant, on the first day of January, 1885, or at any time, wrongfully or otherwise entered upon or ousted the plaintiff from about 400 feet of said lode, or any part thereof, and denies that it now wrongfully or otherwise withholds the same from plaintiff.

3. It denies that the value of the rents, issues and profits of said premises from said first day of January, 1885, amounts to the sum of $250,000, or to any sum at all, and denies that the plaintiff has been by the defendant excluded therefrom since said date or at any time.

For a second defense.

The defendant, further answering the complaint, says:

1. That it is, and ever since the 15th day of December, A. D. 1879, it hath been, the owner and seized in fee and in the actual possession of the Colorado Central Lode mining claim survey, lot No. 261, being a lode mining claim 1,500 feet in length by 50 feet in width, and of all lodes the tops or apexes of which may be found within the lines of said survey, lot No. 261.

2. That said Colorado Central Lode mining claim was entered for patent and patented by the United States to the grantors of defendant before said date and long before the real or pretended discovery, location or patenting of said Aliunde Tunnel lode, No. 2.

3. That said Colorado Central Lode mining claim lies immediately to north of and adjoining the survey lot of said Aliunde Tunnel lode, No. 2, and that whatever vein the defendant has worked on is the vein of the Colorado Central lode, or some vein having its top or apex within the side lines of said survey lot No. 261, and not within the side lines of the survey lot of said Aliunde Tunnel lode, No. 2.

4. That defendant has not wrongfully or otherwise ousted plaintiff from and has not withheld and does not now withhold, wrongfully or otherwise, possession of said Aliunde Tunnel lode, No. 2, or any vein having its top or apex within the side lines thereof, from the plaintiff, and has not extracted or removed any ore from the alleged premises of the plaintiff, and denies that the rents, issues and profits of the premises sued for amount to the sum of $250,000, or any sum whatever.

MORRISON & FILLIUS,
Attorneys for Defendant.

Indorsed: 1862. Circuit court U. S. John Turck *vs.* Colorado Central Cons. M'g Co. Answer. Filed March 16th, 1888. William A. Willard, clerk. Morrison & Fillius, attorneys for def't.

And afterwards and on, to wit, the 17th day of March, A. D. 1888, came again the said plaintiff by his attorney aforesaid and filed in said court and in said cause his replication to the answer heretofore filed herein.

And the said replication is in words and figures as follows, to wit:

Replication.

UNITED STATES OF AMERICA, *District of Colorado*, } ss:

In the Circuit Court of the United States within and for the District of Colorado.

JOHN TURCK, Plaintiff,
vs.
THE COLORADO CENTRAL CONSOLIDATED MINING COMPANY, Defendants.

Plaintiff replying to first paragraph of the second supposed defense in the answer of the defendant, denies that defendant
6 owns the Colorado Central lode for the distance of 1,500 feet or that it owns any portion thereof at any point beyond 150 feet southwesterly from the Harris shaft, so called, upon said lode; that at the last-named point said Colorado Central lode leaves the southeasterly side line or said survey 261, and passes outside of said survey lot into survey lot No. 1494, owned by this plaintiff, and

does not return again in its general course and strike to said survey lot No. 261; that from the point where said Colorado Central lode passes the southeasterly side line of said survey lot 261, it ceases to be the Colorado Central lode or any part or portion thereof, in fact or in law, but from that point on in the southeasterly strike and trend is no other lode than the Aliunde Tunnel lode, No. 2; denies that the top or apex of said Colorado Central lode can be found at any point within the side or end lines of said survey lot No. 261, after it passes the southeasterly side line thereof.

Plaintiff replying to the second paragraph of the supposed second defense admits that the Colorado Central lode is older in point of discovery and patent than the Aliunde Tunnel lode, No. 2.

Plaintiff replying to third paragraph of the supposed second defense admits that the Colorado Central Lode mining claim location lies immediately to the northwest of and adjoins survey lot 1494, belonging to this plaintiff, but denies that any part or portion of said Aliunde Tunnel lode, No. 2, on which plaintiff has been working for so long a time and is still working, is any part or portion of the Colorado Central lode; denies that said vein which this plaintiff has been and now is working has its top or apex within the side or end lines of said survey lot No. 261, at any point southwesterly from a point 150 feet southeasterly from the Harris shaft.

Plaintiff, replying to the fourth paragraph of the supposed second defense, denies it is not true that the defendant has not wrongfully ousted him from and has not withheld and is not withholding the possession of said Aliunde Tunnel lode, No. 2, from a point 150 feet southeasterly from the Harris shaft and at a point about 300 feet beneath the surface of the earth, and from there down so far as said lode extends into the earth; denies it is not true that said defendant has not taken out, extracted and removed a very large quantity of rich and valuable ore from said Aliunde Tunnel lode, No. 2; denies that the rents, issues and profits of such ore does not amount to the sum of $250,000.

Wherefore, plaintiff demands judgment as in and by his said complaint he hath already prayed.

L. C. ROCKWELL,
Attorney for Plaintiff.

Indorsed: No. 1862. In the circuit court of the United States. John Turck, plaintiff, *vs.* Colo. Cent. Cons. Mfg Co., defendant. Replication. Filed March 17th, 1888. William A. Willard, clerk. L. C. Rockwell, attorney for plaintiff.

7 And afterwards and on, to wit, the 15th day of January, A. D. 1890, came again the said plaintiff by his attorney aforesaid, and filed in said court and in said cause his amendment to the complaint heretofore filed herein.

And said amendment is in words and figures as follows, to wit:

Amendment to Complaint.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the Circuit Court of the United States within and for the District of Colorado.

JOHN TURCK, Plaintiff,
vs.
THE COLORADO CENTRAL CONSOLIDATED MINING COMPANY, a Corporation, Defendant. } No. 1862.

Comes now the plaintiff, by L. C. Rockwell, his attorney, and by leave of court files this his amendment to the complaint in this cause:

Strike out the word "four" between the words "of" and "hundred" in the last line of page 2 of the complainant and insert the word "six."

L. C. ROCKWELL,
Attorney for Plaintiff.

Indorsed: No. 1862. United States of America, district of Colorado. In the circuit court. John Turck *vs.* The Colorado Central Consolidated Mining Co. Amendment to complaint. Filed Jan. 15, 1890. William A. Willard, clerk. L. C. Rockwell, attorney for plaintiff.

And afterwards and on, to wit, the 20th day of May, A. D. 1891, the same being one of the regular juridical days of the May term, A. D. 1891, of said court, present: the Honorable Moses Hallett, district judge, the following further proceedings was had and entered of record in said court and in said cause, to wit:

Order: Trial, Verdict.

JOHN TURCK
vs.
THE COLORADO CENTRAL CONSOLIDATED MINING COMPANY. } 1862.

Action for possession of specific real property and for damages.

At this day come again the said parties by their attorneys respectively, and said jurors being now all here present and in the jury-box, the trial herein is resumed.

8 The said jurors having heard the evidence produced herein and the instructions of the court, return to their room under charge of a sworn bailiff to consider of their verdict.

And afterwards, and on this day, come again the said jurors and on their oaths do say they find the issue herein joined for the plaintiff; and they further find defendant guilty, and that plaintiff

is the owner in *fee* of the lode and premises described in the amended complaint, and is entitled to the occupation and possession thereof.

And afterwards and on, to wit, the 25th day of June, A. D. 1891, the same being one of the regular juridical days of the May term, A. D. 1891, of said court, present: the Honorable Moses Hallett, district judge, the following further proceeding was had and entered of record in said court and said cause, to wit:

Order: Motion for New Trial Denied; File Bill of Exceptions within Sixty Days.

JOHN TURCK
vs.
THE COLORADO CENTRAL CONSOLIDATED MINING COMPANY. } 1862.

Action for possession of specific real property and for damages.

At this day comes the said plaintiff by H. M. Teller, Esq., his attorney, and the said defendant by C. J. Hughes, Esq., its attorney, also comes.

And the motion of the said defendant for a new trial herein having heretofore come on to be heard, and having been argued by counsel, and by the court taken under advisement, and the court being now sufficiently advised in the premises, it is ordered by the court for good and sufficient reasons to the court appearing, that the said motion be denied.

And day until sixty days from this day is allowed the said defendant within which to file its bill of the exceptions reserved by it upon the trial of the issues herein joined.

And afterwards and on, to wit, the 10th day of July, A. D. 1891, the same being one of the regular juridical days of the May term, A. D. 1891, of said court, present: the Honorable Moses Hallett, district judge, the following further proceeding was had and entered of record in said court and in said cause, to wit:

9 *Order: Judgment to be Entered; Time Extended for Filing Bill of Exceptions.*

JOHN TURCK
vs.
THE COLORADO CENTRAL CONSOLIDATED MINING COMPANY. } 1862.

Action for possession of specific real property and for damages.

At this day comes the said plaintiff by Willard Teller, Esq., his attorney, and the said defendant by C. J. Hughes, Esq., its attorney, also comes.

And thereupon the said plaintiff moves for judgment herein.

Wherefore it is considered by the court that judgment be entered upon the verdict of the jury herein in favor of the said plaintiff

and against the said defendant for the possession of all that part of the Aliunde Tunnel lode, No. 2, that lies outside of and north of the side lines of said lo*ad* claim, and within lines parallel to the end lines of the said Aliunde Tunnel lode, No. 2, one of which shall intersect the southwest corner stake of the Colorado Central location survey No. 261 and the other parallel thereto drawn through the point of intersection between the north side line of the said Aliunde Tunnel lode, No. 2 (it being at that place identical with the south side line of the said Colorado Central lode claim), and the southerly line of the Sub-treasury Lode mining claim, and being five hundred and twenty (520) feet in length on said vein, situate in Argentine mining district, county of Clear Creek, and State of Colorado, and the said plaintiff's costs to be taxed.

And thereupon, on motion of the said defendant, the time for filing its bill of exceptions herein is hereby extended thirty (30) days, and supersedeas bond upon writ of error will be in five thousand dollars ($5,000).

And thereupon, and on the same day, to wit, the 10th day of July, A. D. 1891, judgment was duly entered against the said defendant in the judgment book of said court, in pursuance of the statutes and rules of court, in words and figures as follows, to wit:

10 *Judgment.*

JOHN TURCK
vs.
THE COLORADO CENTRAL CONSOLIDATED MINING COMPANY. } 1862.

Action for possession of specific real property and for damages.

On this 10th day of July, A. D. 1891, the same being one of the regular juridical days of the May term, A. D. 1891, of said court, there being present the Honorable Moses Hallet, district judge.

It is considered by the court that the said plaintiff do have and recover of and from the said defendant possession of the property, lands and tenements in said complaint described, to wit: All that part of the Aliunde Tunnel lode, No. 2, that lies outside of and north of the side lines of said lode claim, and within lines parallel to the end lines of the said Aliunde Tunnel lode, No. 2, one of which shall intersect the southwest corner stake of the Colorado Central location survey No. 261 and the other parallel thereto drawn through the point of intersection between the north side line of the said Aliunde Tunnel lode, No. 2 (it being at that place identical with the south side line of the said Colorado Central lode claim), and the southerly line of the Sub-treasury Lode mining claim, and being five hundred and twenty (520) feet in length on said vein, situate in Argentine mining district, county of Clear Creek, and State of Colorado, and that he have a writ of possession therefor.

It is further considered by the court that the said plaintiff do have and recover of and from the said defendant his costs by him

in this behalf laid out and expended, to be taxed and have execution therefor.

The plaintiff, to maintain the issues on his part, called as a witness EDWIN E. CHASE, who, being duly sworn, testified as follows:

Direct examination by H. M. TELLER, Esq.:

Q. Mr. Chase, where do you reside?
A. I have lived at Central City for the past eleven years.
Q. What is your business?
A. Mining engineer, United States deputy surveyor.
Q. How long have you been engaged in that business?
A. Eleven years.
11 Q. Where?
A. In Central City.
Q. What experience have you had in it?
A. I have been engaged continuously in surveying, inspecting and examining mines in Gilpin and Clear Creek counties, some in Boulder and Park county.
Q. Do you know the property in controversy here, the Aliunde and the Colorado Central mines?
A. Yes, sir.
Q. Have you made an examination of that property?
A. Yes, sir.
Q. When?
A. In November, 1889, and last month I made a survey and examination for the former suit in 1889, and again this year for this present suit.
Q. How thoroughly have you examined that property?
A. Well, I have been through every place that was open that I could get through in the ground in controversy.
Q. In all the workings?
A. Yes, sir.
Q. Plaintiff's and defendant's?
A. Yes, sir.
Q. Did you make that map?
A. Yes, sir.
Q. Is that made from actual measurements?
A. Yes, sir; made from joint survey; notes used from that.
Q. Who assisted in making the joint survey?
A. Mr. Maxwell assisted me, and on the part of the defendant Mr. A. E. Chase, Mr. Dewey of Georgetown.
Q. Explain to the jury what you mean by a joint survey.
A. A joint survey is a survey in which there are engineers and surveyors representing each side of the case; they are supposed to do their work jointly, altogether, so that there is no discrepancy or dispute as to figures or as to points found by which to make the maps; these two maps will practically agree in their appearance, and are made from common notes.
Q. You may go to the map and explain to the jury the map so that they will understand.

A. There are really three maps here; on the left-hand side of this upper map is a plan of the workings—that is looking down from the top vertically into the earth; that is the way the workings would appear if the mountain were so you could see right down as though it were glass; on the right hand are cross-sections taken at two points, *a a*, and *b b*, where the mountain is cut right down square with the general direction of the — and shows it as marked here in cross section; this map of plaintiff gives the true dip of different workings and true inclination of the vein, and so forth. At the bottom is a longitudinal map, which is made by supposing a plane carried right down lengthwise of this map and the
12 one side removed so that you look right in and see the levels and the stopes.

Q. Point out the surveys and explain the surveys before you begin to go into the details.

A. On the surface we have first the oldest patent, the Colorado Central, survey 261 in yellow, 50 feet in width, and shown here at the west end; next in order comes the Sub-treasury, colored in gray, survey 519, lying across the Colorado Central; next in order comes the Aliunde Tunnel lode, No. 2, survey 1944, in pink, and takes up the remaining ground; next comes Colorado Central Extension, 1758, colored in blue, lying north of the Colorado Central; also the Aliunde Tunnel lode, No. 1, several claims—Randolph, Roscoe Nolan-Gilmer. That represents the surface.

Now, on these cross-sections we use the same coloring, so as to identify one with the other; the Aliunde, No. 2, in pink there and pink here.

The map is on a scale of twenty feet to an inch all through. This arrow shows the direction north; for convenience we will call everything at top of the map the north; the right hand, east; the bottom, south. There is a gulch runs through in this direction, marked here nearly east and west, and the mountain rises on each side from that gulch.

These black marks represent the tops of shafts. The form of coloring adopted is such that you can distinguish openings at different depths, and corresponds in this map, as for instance, on this cross-section, A A, the Aliunde tunnel is marked in yellow, and the same here on the plan; and everything of that depth is about the same; is colored in the same way. Next below that is the No. 1 level in dark gray; then we have the corresponding color here out on the plan map. To determine the depth at which any opening is you can look over these cross-sections. It will show the relative depth on a scale of twenty feet to the inch, and can determine the actual depth in the same way, with the blue and the blue level on the plan.

Q. Explain B B about that surface that does not go clear to the top of the ground.

A. This cross-section, B B, was made at the former trial, when no portion of the mine was surveyed below the six-hundred-foot level, and consequently extended down to here (showing), and in order to

get it on one map, not have so many maps, it was not carried up clear to the surface.

The line B B is marked 120 feet on the surface; so the surface at this point is about the top of my pointer. For this trial the additional surveys were platted right on the same map. I don't think it makes any confusion, because this right-hand part of the
13 plan is outside of the ground in controversy, which ends at the east end line of the Aliunde Tunnel lode, No. 2, and this is consequently marked right down through that, and can relatively be seen the way it lies.

Q. That is simply another map that could have been put on another paper as well?

A. Yes, sir; to save room kept it right on the same map, as it was already there.

Q. Go on.

A. Starting from the Aliunde Tunnel lode, No. 2, we have starting from the surface the Aliunde tunnel, shown by my pointer at the mouth, and running in this direction out to the turn, about 180 feet; that runs through slide and debris up to about the 75-foot turn, where it strikes bed rock or country rock. It then continues in a westerly direction through country rock until it strikes the south side of Turck's south vein. There are two veins of Mr. Turck in this territory, having one common top or apex; and they diverge as they go down, as is shown on this section, A A, one being called the south vein and the other the north vein, and uniting at or just above the Aliunde Tunnel level.

Just before you come to the west end of this tunnel level there is the discovery shaft up through to the surface, as shown on cross-section, A A. About fifteen feet west of that is the main working shaft, sunk down with a little pitch to the north. I will explain, however; the terms "pitch" or "dip" is its departure from the horizontal; if perfectly horizontal, there would be no pitch, if perfectly vertical, 90 degrees, half way between is 45 degrees.

The strike of a lode is the general direction of a parallel level line along one of the levels. Most of you know what a shaft is, an opening sunk from the surface, and as a general thing either vertical or pitching to some extent from the vertical.

A winze is the same as a shaft, only sunk inside of a level, and is sunk down, connecting one level with another. At this point I described, near the west end of the Aliunde tunnel, we strike the south side of the south vein, and the tunnel is continued through there until we come to the top of the Thompson raise, which marks the north side of Turck's north vein, and from that point a drift on the north wall continues easterly out to the surface, now filled up.

Q. Mr. Chase, show where the side lines of Mr. Turck's claim are, with relation to that point—the dip of the vein.

A. The north side line is shown by this black line, separating the yellow and the red, shown by my pointer, also shown on this cross-section there, and extends about 150 feet south, colored in pink. As you go along this Aliunde Tunnel level westerly, we follow

along the north wall of this north vein, and the thing of
14 note we find is the McCloskey raise; that is, a raise put up from this level a distance of 45 feet. It raises up on rather a flat dip, something like that (indicating), and at the distance of 45 feet up it joins with the south vein which we have already once crossed in the Aliunde Tunnel cross-cut. That shows the junction of the two veins at that point (showing). At that point, about 25 feet west, we come to the green cross-cut marked in this direction (indicating), 135 feet in length. At a distance of 17 feet in that cross-cut we first strike the south vein, a large vein about 15 feet in width. There the rest of the cross-cut is continued through country rock out to this bend, and where it strikes a *poyphycy* dyke, and the rest of the way it is continued in that porphyry. This level continues still further west, following along the north wall until we come to the Swede shaft. The Swede shaft is sunk partly on the south vein, and is now mostly filled with water.

Q. What shaft is that?

A. The Swede shaft. At the Swede shaft the level takes a bend to the south, and is cross-cutted over to the north vein, and the level then continues along on the south vein. A small cross-cut runs to the south, just west of the Swede shaft, gets into the country rock and shows the boundary of the vein on that side, and this tunnel level continues still further west, out to the Hopkins shaft, where there is a cross-cut running 33 feet north, and marks the limit of the vein on that side, showing a well-defined north wall and the balance of the cross-cut in country rock. Nearly opposite that, 7 or 8 feet further west, we have a cross-cut running to the south. At a distance of 10 feet in there we come to the south side of the south vein. The two veins there are practically together, and not far from the apex.

This level continues still further west a total distance of 390 feet. Nearly opposite the main working shaft is what is called Von Holzer tunnel. That is a tunnel run at right angles to the vein, and a distance of 30 feet, where it takes a turn, runs out to the surface. That tunnel is run through country rock a whole distance of 30 feet, showing that the vein is south of that tunnel and marks the bounding of the country rock. That completes the workings on the tunnel level. Now, to get down to No. 1 level, a distance of 68 feet below, on Turck's north vein, we go down the Thompson raise, which is shown on cross-section A A, giving that, showing the pitch and intersection, coming down to this point where that black mark is. We can also go down to the same place by going down the main-engine shaft, which is sunk on the south vein down to this mark, No. 1 level, where a cross-cut runs over to the foot of this Thompson raise.

On the first level, No. 1, a little east of the Thompson raise, is the head of the Elliott raise, and just at that point there is an up raise made into the Fisker stope, which is marked on this cross-section A A.

15 The Fisher stope is continued up on a plane and shows a good hanging wall. And, by the way, a hanging wall is the

wall that hangs over the level. Where a vein has a pitch as they generally do, the wall on the upper side is called the hanging wall, and on lower side the foot wall. This Fisher stope is sunk on the north side of Turck's north vein, and the Thompson raise is on the south side, showing a small horse between. That is, a mass of country rock surrounded by the vein on each side.

No. 1 level is not drifted but a short distance on the south vein. As you go along No. 1 cross-cut, which runs 65 feet, cross-cutting the country rock, we first strike this intermediate vein, which runs in a westerly direction a distance of 150 feet along the north or hanging wall until we come to Allspaugh cross-cut that is run at right angles to the level fifty feet in length and strikes the south vein at the end. That level is continued still further west to the foot of the Hopkins shaft. This flag mark showing the top of the shaft at the top of the level, it being continued through so we can go through the tunnel level down to the No. 1. There is a connection through this Hopkins shaft and also through this Thompson raise. This level is continued east No. 1 level—along this Turck's north vein a distance of 100 feet to the end.

That is also shown on this longitudinal section map as marked here, the Thompson raise connecting the tunnel level with No. 1, the Fisher stope, which is not quite broken through to the tunnel level on account of being under the engine chamber where it would shake things up.

No. 2 level is at a distance of 84 feet below No. 1 and is marked in blue. There is a connection, two connections, through from No. 1 to No. 2. One is through the Elliott raise shown on both maps, and having about the same dip as above and run from the foot, near the foot of the Fisher stope, down to this black mark here. At a distance of about 35 feet down you can see where this vein in the Thompson raise comes into the vein in the Elliott raise and marking the point of that horse, so it is practically one vein there. The Elliott raise is continued down to No. 2 level.

There is also near the east end of the No. 1 level a connection through what is called the Bruce stope, and the mill-hole is shown on this map. This colored in dark represents the ground stoped out along the vein, so that there are two connections from No. 1 to No. 2.

No. 2 level is shown in blue and also on this section (indicating). It is a drift on the north vein running west 120 feet with a cross-cut ten feet to the north. At a distance of 75 feet from this is the cross-cut which is called No. 2 cross-cut out to this vein, and then to the Edwards cross-cut beyond.

16 This No. 2 level is also run easterly a distance of 190 feet, and at a distance of 25 feet from this cross-cut we come to the top of the Arnold raise, a connection on the vein from this level down to the No. 3 level.

Now from No. 2 down to No. 3 we can go right down on the vein, following a good hanging wall through the Arnold raise, and come into No. 3 level at a distance of 82 feet below. That level is continued both easterly and westerly as shown in red. There is a mark

put through the center of this level to distinguish it from workings made by the defendant, also colored in red, which is about at the same level, being about 12 feet below; so that south of my pointer are the workings as a general thing done by the plaintiff and north are the workings which have been done by the defendant.

Q. By the plaintiff, you mean Mr. Turck?

A. Mr. Turck.

No. 3 level extends westerly and at two points there are short cross-cuts run out, showing that the vein is followed in this level; those cross-cuts being in country rock in each case. At the end of the main cross cut which runs between the south and the north vein of Mr. Turck's this cross-cut is still continued out a short distance into the country rock, showing the good hanging wall right along the north side of the level. This level continues easterly in this direction, making something of a bend following along on the vein, and the first thing we strike is the Thomas shaft, a small shaft sunk below the bottom of the level. Continuing along easterly we come to the foot of a mill-hole, a stope shown on this sectional map which extends above the level and is nearly holed through the No. 2 level, the connection not being quite made when I was there, which is marked on this longitudinal section map.

Still further along we come to the top of what is called the Richardson winze, which is sunk along the vein, the Turck's north vein, pitching to the north, as it is above connected through to the stope below.

Q. Who sunk that, Mr. Chase?

A. Mr. Richardson, I think.

Q. But who?

A. Mr. Turck; it was Mr. Turck's workings.

No. 3 level is continued along easterly until we come to what is known as the Johnson raise, a raise put up a distance of 120 feet, 110 feet above this No. 3 level, and pitches as is shown on this cross-section B B, so that the top comes inside of the Aliunde Tunnel lode, No. 2.

17 Q. Is that put up on the vein?

A. Yes, sir; it is cribbed up now, but the bottom starts up on the vein. I don't think there is any question but what it continues on the vein to the north wall.

From No. 3 level, from there down, you can go down the Richardson winze following along the vein and showing a good hanging wall into what is called the Wallace stope, as shown on this section here. At a distance of twenty feet down in the Richardson winze there is a drift run 30 feet. There another connection is also made as shown here into the stopes all along the vein, making two connections from No. 3, down into the stopes which rise above the 500-foot level, which is in green. The green 500-foot level is about 510 feet below the No. 3 level, and is on the same vein as shown here in green. Before I go to that I will describe the main working shaft which is shown on this section A A that is sunk on the south vein of Mr. Turck's, which, as I have said before, unites with the north vein at or a little above the tunnel level and diverge as they go

down, not having as much pitch. That is shown correctly on this section, and in order to reach this north vein and save having two shafts to work up, cross-cuts are run from the south vein over to the north vein through the country rock as shown on this section, No. 1 cross-cut, it is about 60 feet between the two veins, and the edge of the cross-cut 73 feet, and the No. 3, about 90 feet. The shaft also continues down to No. 4 level, and the cross-cut is run northerly from that. That is cut off by water. As to the top of this vein, it is shown at these points inside of the Aliunde lode, No. 2, at the extreme west end of the Hopkins shaft, we have the two veins practically together although they continue up a short distance further before we get to the real apex; at the McCloskey raise we have the two together, 45 feet above the tunnel level, and we also have near the discovery shaft. They are very close and this drift runs out easterly to gravel and there is also a shaft 84 feet deep as marked here which I have not been down. That shows the apex of the vein running in a general direction through the Aliunde Tunnel lode, No. 2 survey. Now this point of junction of Turck's north vein and the south vein gradually works down into the earth as you go east. I will illustrate that by this piece of paper. That is the way that the south vein stands with something of a pitch like that. The north vein diverges from it (showing) and the point of junction falls as we go down just the same as is shown by these two pieces of paper, so that if we have one top——

Q. Take those apart so they can see it.

A. As shown like that (indicating); not quite so much. There is the way the relation of Turck's north vein and his south vein; the south vein would be more perpendicular, and the north vein diverging, and the line of junction running down as we go
18 east.

Now down to Turck's No. 3 level, in red, to get below that we go down the Richardson winze into the stopes below, and also in this level, which is 20 feet down where at the west end a hole is broken through into this Peterson stope, as shown on this longitudinal section. You can then go through these stopes. You understand by stope it is an opening on the vein where the ore is taken out, and as shown on this section, all this representing ground that has been worked out along this sheet of ore or vein matter.

At the bottom of the Richardson winze you can go west along these stopes and clear down into the 500-foot level at several points, one here at this mill-hole, and still further west on to other mill-holes, as shown by these marks here. That 500-foot level is shown in green, and is run continuously on this vein, with the exception of this break through here of about 30 feet, where it is not worked through, being on the same vein without any question. At this point where my pointer is shows the junction on that level of Turck's north and south vein, the south vein being shown by the south (green), and being the same vein as the red above, and this vein running in that direction being on the north vein.

The next level below the 500 is the 600, shown in brown on this plan and also on the cross-section. To get into the 600 from the

500 there is a line of stopes running from what is called the Nelson West mill-hole, as shown on this longitudinal section, clear out to the Hoglund shaft, that ground being practically worked out right on the vein from the five to the six.

Q. What distance?

A. A distance of about at least 350 feet in length, with continuous stope from the Hoglund shaft out and beyond the Nelson West mill-hole, so that from the five you can go down to the sixth on one continuous vein to either the Hoglund or the Nelson West mill-hole, or through the stopes between where they are accessible. The 600-foot level is shown in brown, as marked by my pointer, and below that the connection down to the next level is through the Webster shaft, the Webster shaft being sunk on the 600-foot level down to the 650, 750 and 850 foot level, shown on this longitudinal section in this cross-section, that showing the proper dip, this showing the ground worked out.

The 650-foot level is shown in a sort of violet color on the plan, and runs about 45 feet westerly of the Webster shaft and 60 feet easterly.

One hundred feet below that is the 750-foot level, which is also connected with the 650 by means of a stope and mill-holes, as shown on the longitudinal section.

19 One hundred feet below that is the 850-foot level, run out to the east a distance of about 150 feet, above which no stoping has been done, so that we have gone from the tunnel level right through on one continuous vein right down to the 750 and 850 foot levels.

Mr. Chase, you speak of a vein; is there ore all the way through there?

A. There is ore in a great many places, and where it has practically been sunk not only on a vein, but on an ore body, as shown by these stopes which have been taken out to get at the ore.

Q. Anything further you want to say about it?

A. These cross-cuts connecting the south and the north vein of Mr. Turck's are run through country rock, which is composed of granite and mica schist and gneiss. Gneiss is a stratified granite. The same material as granite, only of a stratified—that is in layers, and running in a general direction nearly north and south in this mine.

These cross-cuts are through country rock between the two veins, except that where they strike small feeders occasionally—one at the end of a Evans cross-cut, a very small streak, and at No. 3 cross-cut, a distance of 25 feet in and from the south vein—we have a drift on the intermediate vein, which at the east end unites with the south vein, showing another point of junction of the south and north vein as they go into the earth.

Q. These small veins you mentioned, is the country rock mineralized to any extent between them?

A. No, sir; it is hard country rock; scarcely any appearance of mineral in them.

Q. You spoke of this stope down there being nearly through, how near is that through?

A. When we made the survey it lacked ten feet of being through. It has been worked continuously ever since.

Q. Can you hear the working, is it certain it is going to break through into that level?

A. Yes, sir; the survey shows it.

Q. No question about it, is there? I want to call your attention to the McCloskey level and the Johnson raise there in connection; when was that made; point that out to the jury; show where the McCloskey level is.

A. The McCloskey level is run on the south vein at a distance of 43 feet above Mr. Turck's No. 4 level; that level is run through on the south vein and connects with what is called the winter raise, which comes up from the 400-foot level of the Colorado Central. They are both on the same——

Q. Show where it runs.

A. That is marked in boundary lines; it was not accessible for survey.

Q. When was that run?

A. A good while ago.

Q. Do you know by whom it was run?

A. No, sir.

Q. Now show it on the lower map; can you?

A. That is shown on this longitudinal section map.

Q. Where?

A. At the point marked the McCloskey level, a distance of 43 feet up the Johnson raise.

Q. Do you know how near it is brought up to the surface or to the wash?

A. The Johnson raise?

Q. Yes.

A. The Johnson raise is shown on section B B, at the top, as it is now; it is, as near as I can estimate something about 30 feet further up to this wash.

Q. Is that within the Al-unde side lines?

A. It is already within the Aliunde side line.

Q. Where it is now left?

A. Where it is now left and continued up through country rock, on the pitch, it is below; it would bring it still further inside of the Aliunde side lines.

On this longitudinal map, at each end, is shown the cross-section somewhat similar to the one on the other map, showing the dip of the vein as it goes into the earth to the north.

Q. Now, I want you to state briefly and quickly what you find about the hanging wall, or what you call Mr. Turck's north vein, and how much of it, where it is opened you found the hanging wall—what you found.

A. I found a continuous hanging wall from the tunnel level clear down through these stopes and shown also in the levels run along Turck's north vein, showing good, continuous hanging wall

the whole way, making it without any question on one vein from the tunnel level down.

Q. You say clear down here?

A. Clear down through the stopes.

Q. What do you call country rock?

A. Country rock is the general mass of the mountain, the granite in this locality; it is granite and mica schist and gneiss, that is the stratified granite in distinction from vein matter; a rock easily distinguished, and a rock most everybody is acquainted with, whether miners or not.

Q. How is it that, as characteristic with reference to other rock in that country about there?

A. It is just the same as far as I can see.

Q. Well, now, the material that you find in these drifts, all through where Mr. Turck has been working in the lode, do you call that crevice material; I mean, take these levels you have given?

A. Yes, sir; those levels are driven upon a well-defined vein.

21 Q. These cross-cuts, going across from the south wall to the north, what are they driven through?

A. Those are driven through country rock.

Q. Any crevice material?

A. No, sir.

Q. Are those cross-cuts timbered?

A. No, sir; they don't need to be timbered.

Q. Why?

A. It is hard country rock and stands of itself.

Q. How about the workings on the veins; are they timbered?

A. The workings on the vein are timbered to a large extent.

Q. Why?

A. The vein, as a general thing is softer than the country rock and will cave down in places where it has not been timbered, will keep scaling.

Q. Show briefly where the outcrop or apex of Mr. Turck's No. 2 is on that map, and tell the jury—I don't know whether the jury got it—point out and lay your pointer on it?

A. The apex is shown at the top of the McCloskey raise; that point is very near the apex. There may be a few feet of solid rock up the side. That is practically the apex at that point. In the Aliunde tunnel we strike the south vein at this pencil mark. There is about 30 feet or so of solid rock above that before you come to the slide; so that the apex would be about at that point in the Aliunde tunnel; might be a little further south—the apex is also. The Johnson raise also gives evidence of where the apex is, although it has not come through clear to the slide, but it would be south of the top of this raise, and allowing the dip it is below the top of the Jo-nson raise; would be where my pencil is, and this vein being—allowing for the size of the vein there—about 8 or 10 feet, would bring the apex at this point that I have marked across; so that we will have an apex running through in this direction.

Q. It runs with the claim, does it?

A. Yes, sir.

Q. What is the dip or inclination of this vien, about?

A. It dips a little, it dips to the north; the south vein, as I said, being more perpendicular than the north vein.

Q. I am speaking now of the north vein.

A. The north vein has a pitch to the north, as shown by my pointer.

Q. About how many degrees?

A. Well, about 70 degrees, something like that from the horizontal; that is, in the upper part at this cross-section A A; there are portions of the mine where it has a much flatter dip, as shown on this cross-section B B shown here, this being the south vein and there being about the junction of the north and south vein, the north vein from that point continuing much flatter down to the 600-foot level as shown by that cross-section.

22 Cross-examination of T. E. CHASE by Mr. MORRISON:

Q. You made that map, Mr. Chase?

A. Yes, sir.

Q. How many maps have you got on that board?

A. I have got two maps, representing three different forms or sections, appearances.

Q. Ain't there four?

A. This is just a plan map at the surface of the earth; these are cross-section maps to the right.

Q. That is two?

A. Also showing a cross-section here and the longitudinal is three.

Q. Ain't there four?

A. Where do you make four?

Q. Ain't there four?

A. No, sir.

Q. The map on the bottom of the canvas is one, is it not?

A. Yes, sir; as I said, that is one.

Q. Then you have your general plan map at the left?

A. Yes, sir.

Q. Then you have your cross-section to the right?

A. Those there, and also here, similar.

Q. You have your cross-section to the right of the upper map, have you not?

A. Yes, sir.

Q. Then to the north or the upper part of the center, of the upper muslin, you have another plan or map, have you not?

A. Here?

Q. (Indicating).

A. That is a cross-section.

Q. It is another plan or map disassociated from the plan map, is it not?

A. These two cross-sections?

Q. Please answer the question direct.

A. Yes, sir; they are different from the map.

Q. Have you not then four maps on the board?

A. Not what I call four maps.

Mr. TELLER: Do you include the lower paper?

A. I call it three; we are looking through the top, out sideways, one longitudinally.

Mr. TELLER: It is perfectly immaterial.

Q. Please explain; this represents the Sub-treasury patent, the same as shown on there?

A. Yes, sir.

Q. What is it you made parallel with the Aliunde and Colorado Central on that map?

A. Where this line B B is marked on the plan map, we take the cross-section at this point. Is the north line of the Colorado
23 Central shown there? Next, beyond that ten feet, we strike the south line of the Sub-treasury at that point (indicating).

Q. Why do you leave a space between the Colorado Central and the Sub-treasury?

A. Because at that section there is a space.

Q. What represents it there?

A. Yes, sir.

Q. That belongs to what lode? There seems to be a vacant piece of ground in there not covered by these patent surveys, but by the recent —; is it not covered by 1578; then it is in this little triangle goes through there?

A. Yes, sir.

Q. Then, when it crosses the Colorado Central here, this upper plan, and this crossing is totally unconnected with the lower map?

A. Oh, yes; the map as I said before, for the former trial, only needed to come down to there; I don't think there is any confusion by imagining this country down to there representing that——

Q. I want to get that clear; not starting at the surface; you find the surface here in Turck's works at the letter A do you not?

A. Just below there; yes, sir.

Q. And from A down to the Aliunde tunnel is practically wash or slide, loose, I think?

A. All but about 30 or 35 feet.

Q. I understand all above the extension of the Aliunde tunnel that level would be practically slide; contains no mineral or anything else on any map that could be drawn?

A. A certain distance this level out here runs out to the slide——

Q. What I mean, Mr. Chase, I want you to answer my question shortly as you can practically; the upper part of this map is simply gravel or slide with no vein developments on either side?

A. Yes, sir.

Q. And the practical tapping of the vein itself is at this yellow level?

A. Yes.

Q. This arrow indicates the direction in which you come in from the surface?

A. Yes, sir.

Q. Now coming in from the surface, reaching the vein at Turck's main shaft, you follow as you believe a vein nearly vertically down several hundred feet as indicated by my pencil, do you not?

A. Yes, sir.

Q. That you consider a vein by itself?

A. Yes, sir.

Q. You call that the south vein because it is the one you find first south in the workings?

A. Yes, sir.

Q. Going back to the starting point at the head of the Thompson raise, you find another vein, do you not?

A. Yes, sir.

24 Q. You follow that down the No. 1 level?

A. Yes, sir.

Q. That makes two veins you have so far in Turck's workings?

A. Yes, sir; one top.

Q. At No. 1 level, where you find these two veins going a little further north in the level, you find a work called the Fisher stope, do you not?

A. Yes, sir.

Q. And tracing that up you can follow it clear up to the Aliunde tunnel, can you not?

A. Very nearly; not broken clear through.

Q. But very nearly so?

A. Yes, sir.

Q. You consider this vein goes up and unites with the Fisher stope here?

A. Unites with the south vein; yes, sir.

Q. So that you have a connection all the way from the starting point here down to there and then another one going down more to the north?

A. Certainly.

Q. Between those two veins you have vein or vein matter on the Thompson raise?

A. Yes, sir.

Q. Does that make three veins or does it not?

A. No, sir.

Q. Why does it not?

A. For this reason: The Thompson raise is sunk on the south side this north vein and there is a small — of country rock called a horse between those.

Q. You say between the Fisher stope and the Thompson raise there is a horse?

A. Yes, sir.

Q. How many feet wide is that horse?

A. That horse at the widest point is 11 feet by survey.

Q. Do you find that Thompson raise then carried down as indicated by that dotted line and the end of the raise cast or not?

A. It is not connected through; it is done at the top and bottom.

Q. How many feet then is it not connected between the points where it is shown at top and bottom?

A. There is about 25 feet because part of this is connected. There is a stope, you go down the Elliott raise and in the stope there it is partly worked out along this vein going in there.

Q. For how many feet worked?

A. About ten feet.

Q. How many feet of unbroken ground between that point and that?

A. There is about 20 feet.

25 Q. About 20 feet of unbroken ground, you put that dotted line to indicate in your honest belief you think the vein in the Thompson goes down and unites with this one, forming a horse between?

A. Why, certainly; otherwise it would show in the Edwards cross-cut. There is nothing shown. I show it in dotted lines to show to the jury it is not actually connected through.

Q. I see, sir, you have no drift in the same No. 1 level; is that on the vein?

A. That is on a small spur.

Q. It is on vein matter, call it spur or vein; so then in going from this south vein up to the Fisher stope toward the Thompson you have four points in that one level where the vein or spur is cut, have you not?

A. Yes; they don't treat it——

Q. I ask you, dividing that No. 1 level, if you do not strike four veins or spurs, including the one you start from; you say this one is a spur?

A. A small vein.

Q. You mean a small, insignificant vein by the word "spur"?

A. I mean not a distinct fissure vein by itself, that has no continuance or apex itself; that would hole into this other vein, both above and below.

Q. How do you know?

A. Can tell it from the survey, and from these cross-cuts.

Q. You just anticipate that, do you not?

A. Well, the cross-cuts show for themselves.

Q. Very well; supposing it would be in the extreme northern upper portion of the works; there is a vein in the O'Malley cross-cut, is there not?

A. There is a small——

Q. You need not give the size. I ask you if there is not a vein there?

A. It might be called a small vein.

Q. It is proved up to the wash?

A. No, sir.

Q. Don't it?

A. It is proved up 20 feet, where the vein on which this stope is raised continues right into the south side, as can be distinguished under the timbers and marked in dotted pencil on that dip, would continue up into the south vein.

Q. There is a vein there, you say, proved up for about 20 feet?

A. Yes, sir.

Q. Now is that vein that you find here a considerable distance from one side of the vein in the Pollard raise, a distance from the vein in the Johnson raise? It is not connected with either, is it?

A. No, sir.

26 Q. But is it not, according to your belief, in some way connected with that north vein?

A. I believe it is a part of this south vein of Mr. Turck's. I believe it will join it up there.

Q. Why not believe it a part of the north vein?

A. I cannot tell where it would go in going down into the ground.

Q. When you find one mineral wall lying between a vein to the north and a vein, you do not believe that is a totally independent vein, but in some way associated with one or the other?

A. Where you find a small vein, I would naturally suppose it may be a spur or feeder from one of the veins that joins in with it.

Q. Now, then, when you find a vein—take that; that corresponds practically with Mr. Turck's south vein, does it not?

A. Yes, sir.

Q. And this with the north vein in the Colorado Central works?

A. Yes, sir.

Q. You claim to have a vein that connects with two, like a letter M?

A. Yes, sir; and continues below.

Q. No difference where it continues; there is a north vein and south vein, and a connecting vein; is not that the fact, yes or no?

A. Yes, sir.

Q. Now, do you call those three measures, do you call them one vein, two veins or three veins? Just answer that question without explanation, giving your explanation.

A. There are three veins.

Q. You call that three veins? If you found another vein going up to the surface in that way, do you call that still a separate vein?

A. I would want to see it first.

Q. I asked if you found vein matter in that direction would you call it a separate vein, as distinct, or part of the same?

A. I would wait until I saw it. You make an assumption.

Q. Never mind my assumption.

A. If only running up a short distance to the surface, I would say it was a part of this vein, having a top there and a top here.

Q. All right, sir; carrying this north vein down a little farther, and the south vein down a little farther, suppose in working down quite a depth you find another intermediate vein striking off from the south to reach the north in that way and then another one, for instance, until you have three veins striking off in that direction, and you admit there is one up here, would you call those separate veins, or parts of one vein?

A. Until I saw such a condition——

Q. Answer that question, Mr. Chase.

A. That is a theoretical question.

27 Q. Why is it?

A. You say a vein starts out near the surface, connecting the south and the north; if it is a separate vein because it has been developed from the top——

Q. Very well, sir, supposing that vein struck off from the south vein, connected with the north vein at a lower point; is that a separate or the same vein?

A. I would want to wait until I saw it.

Q. You are a scientific man, Mr. Chase, and not in a high school.

A. I will tell you just what facts there are in this case.

Q. I am not asking you for facts just now—we have not heard any yet. Mr. Chase (turning to another map), you made the lower map there; did you not?

A. Yes, sir.

Q. On this last visit up to the lode, this visit in connection with other visits, you made these maps; how long were you there?

A. I was there five days.

Q. There is about four miles of workings in that mine, is there not?

A. There may be, take all of them to the east end; that does not concern the ground in controversy.

Q. There are several miles on that map?

A. No, sir; I think not.

Q. As much as one?

A. I have not figured it up in that way.

Q. You cannot tell?

A. No, sir; not in miles.

Q. At any rate, you made it in five days besides the previous trip, on the previous trip?

A. On the previous trip I had been through the whole thing.

Q. For instance, on this map did you go at the lower cross-cut?

A. Yes, sir.

Q. Examine it through?

A. Yes, sir.

Q. Enough to see it was through country rock from end to end; did you not?

A. Yes, sir.

Q. How long did it take to make that examination at this trip?

A. I examined that very carefully at the previous trip; I spent about 20 minutes in there this trip.

Q. That was the extent of your examination in there?

A. Approximately.

Q. When you came back from this examination, you completed this lower map; did you not?

A. Yes, sir.

Q. And it is supposed to represent a view of the side of a vein?

A. That is, represent the shape of the shaft.

Q. That is to say, if one side—and one foot wall turned away then?

28 A. Yes, sir; that shows the correct appearance of the vein as any person would naturally form it in their minds; this map here, looking down from above.

Q. I am not asking you that. If that lower map were on a narrow vein, no branches stoped up from the 750-foot level up to the top, it would correctly represent a stope, but that is on one vein?

A. Yes, sir.

Q. It is?

A. Yes, sir.

Q. All the stopes on one vein?

A. Yes, sir.

Q. In the Peterson stope, how many veins are worked on?

A. On what point?

Q. On any point.

A. Between the three and the five there is one vein away down; that is the Peterson stope; there is one vein there.

Q. Just one vein?

A. Yes, sir.

Q. How wide is the Peterson stope?

A. It varies in places from four to eight feet wide.

Q. Is not it in places 15 or 20 feet wide?

A. Not that I saw.

Q. Do you say it is worked on one vein or ore streak?

A. I say it is worked on one vein, and from that there are shoots of ore going out which have been taken, which is always done in mines.

Q. Is it not a fact it is worked on two separate ore streaks?

A. No, sir; it is on one sheet; it is on one main ore streak. From that there are in places others shooting out similar streaks.

Q. You claim it is on one ore streak, but you say there are feeders shooting out rich enough to stope.

—. ——.

Q. You went up that Peterson stope; you say the width of it is 8 feet?

A. That is, when I saw it.

Q. You don't believe it is wider than that; you claim it is worked on one single streak?

A. There is one vein ore body runs through the Peterson that can be traced.

Q. Does that still go up on one streak, or is it carried up on two?

A. Up through the Richardson winze.

Q. Up through the Thomas shaft and the workings east and west of it?

A. That Thomas shaft is not completely holed through; the ground is shattered there so that probably it may be a foot or two where it is not connected. By putting a candle there you can feel the draft.

29 Q. Up to the highest point in the workings underneath

the tunnel shaft did you find the Peterson carried up on one ore streak, or did it divide into two?

A. I found one ore streak; it carries up so as to carry the smaller ones part of the way. Right in the Peterson stope it shows more, in this smaller one here, shows running out from the main vein.

Q. When you say that stope is made by the stopes on one bend vein above, that vein must be the intermediate vein, according to your statement.

A. That is as marked on the section. Turck's north vein; what I have been calling it right along.

Q. That is this vein?

A. Yes, sir.

Q. How far down does that extend where it makes the point of connection with any vein in the Colorado Central works?

A. At about the 600-foot level; the point of junction in some places above and in other places below.

Q. You have got that stope carried down how far?

A. Down to the 750-foot level; from the 750 up to the 600 foot level it is on the Colorado Central, but where the two have united it is just as much on the Tur-k's north vein as the Colorado Central; they are one vein there; you can follow it down continuously from the top of Turck's north vein into there.

Q. Another question, Mr. Chase—this Richardson shaft that you pointed out; where is it?

A. It is shown on the longitudinal section where my pointer is. This black mark shows the top, running on down No. 3 into the stope below.

Q. What is it sunk on?

A. On a well-defined vein.

Q. Is it on the north or south vein of Turck's?

A. It is sunk on the north vein.

Q. Is it on the north or south wall of Turck's north vein?

A. It shows the north wall of Turck's north vein. The point of junction north and south is further east than the Richardson winze.

Q. Now going to another point of the mine, that green level is what is called the Marshall Tunnel level, is it not?

A. No, sir; it is the red tunnel marked "4." That is also called the Marshall tunnel; the green is the 500.

Q. Going to that green level, the 500-foot level, at a point corresponding with the Johnson cross-cut, how many separate ore measures do you find there?

A. At a point opposite there?

Q. About there; just a little west of where you have your pointer.

A. We have on the south the main south vein; at that point there is a small spur runs off——

Q. Hold on, Mr. Chase; hold on. (Here the stenographer read the last question.)

A. I cannot answer.

Q. On the 500 or green level at a point where the Nelson cross-

cut is found, on the same plane carried up and down vertically, how many veins are there exposed in the workings?

A. There are three main veins.

Q. How many spurs?

A. There is one spur.

Q. If there are three main veins, there must be six walls, must there not?

A. Yes, sir.

Q. Can you give the width of these main veins, each by itself?

A. The south one varies from four to seven feet in width. The one north, which is on the south side of this porphyry dyke on the north, varies anywhere from three to six feet and ten feet. Further north, on the other side of the porphyry dyke, there is still another vein.

Mr. TELLER: On the north side of the porphyry dyke you mean?

A. Yes, sir; there are three I referred to.

Mr. TELLER: Point them out again.

A. On the south where my pointer is, on the north marked 500 and still again ten feet north of that another vein.

Mr. MORRISON: What is the width of the north vein?

A. The north vein at that point, I should judge, was anywhere from three to five feet in width.

Q. Describe to the jury how it is that you find that two walls between the south vein and the vein next north of it, and at what point in passing from vein to vein? Here is one vein, there is the next, there is the space between them—how is it you distinguish the walls?

A. Connecting this north and south vein, there are a great many cross-cuts by which you may pass from one to the other. Those cross-cuts run through country rock after you leave the south vein until you come to the north vein and showing on each side as a general thing the walls each side of those.

Q. How do you distinguish the wall when you find it so as to know it when you see it again?

A. There is a hanging wall; the walls as a general thing are smooth, hard; well-defined contact between the vein; you can tell whether the wall is smooth when you strip it in a cross-cut. These cross-cuts are run beyond into the wall, in a great many cases going from one of these veins to the other.

Q. You say you have three of them?

A. I have three of them crossing from one to the other by the cross-cut.

Q. How is it you tell by the nature of the rock on the sides of the cross-cut at a certain point you have ceased to have a vein and have reached the country rock?

31 A. Why, it is as plain as can be; there is no more resemblance between the vein and the rock than between black and white, as a general thing. The cross-cuts are hard country rock.

Q. Can you tell when you reach the line of demarkation, or is

that part of it guess-work? Or matter leading up into the country rock imperceptible?

A. As a general thing it is very plain to distinguish; in some cases, for instance, a- inch or a foot on each side will gradually merge into the country; beyond that there will be plain, unmistakable country rock, the boundary of the vein.

Q. Are you able to pass through any cross-cut in that vein which shows three veins and point out to any person each of those walls as you reach them?

A. I could on the ground very readily show.

Q. You could do that?

A. Yes, sir.

Q. There is a strict line of demarkation between country rock and crevice material?

A. Yes, sir, as a general thing.

Q. What are the chemical constituents, what is the difference between them?

A. Crevice material is softer.

Q. I am not asking its softness or hardness, I am calling for the chemical constituents.

A. I have not analyzed it.

Q. You know as an intelligent man, don't you?

A. The vein matter is composed of quartz, and on this south vein rotten, decomposed feldspar material.

Q. And the chemical elements are rotten, decomposed feldspar?

A. Feldspar and quartz.

Q. Can't you give a straighter answer than that?

A. Is not *not* straight enough?

Q. Can't you tell the chemical elements?

A. Why, the vein filling is quartz.

Q. Is there a chemical distinction between the gang and the country rock, or are they chemically the same?

A. The- differ largely; the country rock is composed of granite, which is quartz, feldspar and mica.

Q. That gives the elements of country rock; what is the crevice material or gang composed of?

A. It is composed of quartz, as a general thing.

Q. Any feldspar?

A. In the south vein there is a large amount of feldspar.

Q. There is some quartz and some feldspar, here and there?

A. Yes.

Q. Is there any mica?

A. No.

Q. Then the chemical constituents, feldspar, mica and quartz, and the crevice material — the same thing leaving out mica,
32 are just the same as in all veins in this country? Chemically the- are the same with the exception of the mica?

A. No, sir; not chemically the same.

Q. And chemically about the same as the feldspar, is it not, when you come down to their analyses?

A. I don't pretend to analyze these rocks.

Q. Supposing the chemical elements are the same, would you expect much physical difference between the gang and the country rock?

A. We always do find a great difference, that is the fact.

Q. Quartz in a vein is different from quartz in country rock?

A. There is quartz, to be sure, in country rock, and quartz in the vein.

Q. Entirely different, however, easily to be distinguished. I have only one or two more questions to ask you; leaving out the distinction between spurs and strongly marked veins, how many ore channels, or spurs, or feeders, or veins do you find at any one point on the cross-section?

A. We find four distinct main veins can be found at one point.

Q. Where is that point?

A. Take, for instance, the cross-section, B B; there is Turck's south vein; there is Turck's north vein; then there is the Colorado Central vein on the south side of the porphyry, which joins with Turck's north vein; there is also another vein about ten feet north, on the other side of the porphyry.

Q. Between this Johnson raise, connecting at the top of the Hoglund shaft, is that worked through entirely?

A. On section B B, not right at that point, it is further. These stopes run up on an angle that would bring it into the south vein, and also from there west you can make a connection through on the slopes on the one continuous vein up through the stopes on the same vein, back again on the level on the same vein.

Q. What did you mean when you said you could show it plainer? Why did you color them both, or leave them uncolored?

A. If you like them uncolored, I had just as lief as not. I would prefer to have them colored, myself.

Q. Would not the coloring indicate, as maps are usually drawn, there was a connection made throughout?

A. These maps are subject to any explanation given on any map. No jury will understand the map until it is explained. Those dotted lines show at that cross-section there is not an actual crossing there, but there is further west, which shows they are in the same vein; so there is nothing misleading about the section.

Q. In following down your south vein, where is its apex—where does it cross into the Colorado Central line?

A. I cannot say exactly; it is out somewhere near the east end of the Aliunde, No. 2, survey.

33 Q. I am not speaking of the strike; I am speaking of dip.

A. Oh, on its dip, the south vein on its dip crosses——

Q. Go to the vertical section; show it there.

A. Crosses just below the McCloskey level, about 15 feet on its dip.

Q. Please go to the vertical section—to the extreme right.

A. You want Turck's north vein or south vein? The south vein is not continued.

Q. The south vein.

A. The south vein is not continued.

Q. You have to go a little further down to strike the line?
A. Yes, sir.
Q. The north line gives the point?
A. Right at the foot of the Fisher stope.
Q. Show where that is on the plain map.
A. That is about the point.
Q. Put your pointer on the south line of the Colorado Central.
A. Black line; one yellow.
Q. Everything of Turck's works north of that has got into the Colorado Central side lines, has it not?
A. Certainly.
Q. Where do you claim this south vein on its strike comes through the Colorado Central line?
A. I don't know whether it reaches it or not; it probably does reach it in this vicinity near the east end of the Al-unde tunnel.
Q. It is proved up where it does reach it?
A. Not absolutely.
Q. It is proved where it does not reach it; where it is proved, it does reach it?
A. It is not proved it does reach; not absolutely. The Aliunde tunnel, No. 2, vein goes through it.
Q. Have you any work further east than the Johnson raise from Mr. Turck's workings, to show the apex of that south mineral streak?
A. Not carried up to the mineral; the shaft is sunk vertically.
Q. If that is the vein, which is further south?
A. As to how much, I can't say, because you can see the vein running down the shaft; it is admitted, too, I think you will find.
Q. That Harris shaft is in the slide for about 80 feet, isn't it?
A. I expect so.
Q. Have you got any developments which show that south streak any further east than the Johnson raise?
A. Except this McCloskey level, which is continued.
Q. The McCloskey level runs right into the Colorado Central ground?
A. At that depth.
31 Q. That is, you allow so much for the dip?
A. Certainly; it is actually carried out to that point. The Johnson raise is on the north wall, and bed rock is still about thirty feet further up.
Q. Now, if you had protracted the ore streak carried in that Hoglund shaft clear along the Johnson raise, you would allow for the dip—supposing there had been no workings above the point where that blue line begins, there had been no workings to show any outcrop, no workings—supposing you had a vein proved up on the Hoglund shaft from this north vein clear up to here, on the regular continuous, unbroken dip to that point, and nothing more, then you would assume the same dip to the surface, would you not; yes or no?
A. Not if developments showed something to the contrary.
Q. On that dip you could assume where it would strike the sur-

face? I am assuming there were no developments. Would or would you not claim the continuation of the same dip up to the surface?

A. You could if you wanted to.

Q. And in pointing out where this Johnson raise would prove its surface, you allow for a dip there?

A. Yes; only about 30 feet.

Q. You allow for it; do you not?

A. Certainly.

Q. What have you to show there is or is not any dip in that Johnson raise above its top?

A. We have nothing to show except the general course of this south vein, which you will see is very regular from the 750-foot level clear up to here there is a distance of 400 feet on the dip.

Q. I am not asking that, we assume, we allow you—I say, have you anything except this speculation to show that the vein goes any further south than the Johnson raise?

A. Than the top of the Johnson raise?

Q. Yes.

A. No, sir; except the general dip carried up at the top absolutely.

Q. Mr. Chase, there are one or two or three items you have not spoken about. This 300-foot level (? or those 3) on the Aliunde; have you been down there?

A. No, sir.

Q. You don't know what is in it?

A. No, sir; not of my own knowledge.

Q. Then you don't fix your apex as running along with the shafts from any testimony of yours?

A. No, sir.

Redirect examination:

Q. What is the depth of the McCloskey level where it strikes into the Aliunde ground?

A. The depth of the level?

35 Q. The McCloskey; this here?

A. Below the surface?

Q. Yes; where both these dotted lines show.

A. One hundred and seventy-five feet below the surface.

Q. Does that show the ground? Is the top of the Johnson raise within the ground of the Aliunde claim?

A. Yes, sir; about 12 feet.

Q. Apparently it is still going south?

A. Yes, sir.

Q. So if it continues its course it would go on south?

A. And that is raised on the north wall, and that vein is large, and occurs still further south.

Q. If raised on the south wall it would be still further south?

A. Yes, sir.

Q. By the north wall you mean the hanging wall?

A. The hanging wall.

Q. You spoke of some openings beyond the extreme north opening there; there where you say there was a wall?

A. Yes, sir.

Q. What is the south wall of that extreme north opening on the defendant's openings?

A. There is a porphyry dyke shown on this cross-section B B, from ten to 15 feet in width, in places as small as four or five feet, which bounds that extreme north vein on the south.

Q. Can you show on this other map where the porphyry wall would be?

A. Yes, sir.

Q. Show the jury where the porphyry wall would be?

A. Take for instance the 500-foot level; everything one color is on the same level; those two green openings are at the same depth; one is on the south side of porphyry dyke, the other on the north side, the white space between them shows the width of the porphyry dyke; that is on the green being drifted a long distance each side of the porphyry dyke on the 600-foot level there is the same condition of things as marked where my fingers are now.

Q. Which is still deeper?

A. Which is still deeper.

Q. How much deeper?

A. That is 20 feet deeper; it is called the 600; the same condition of things is shown on the 650 and on the 750.

Q. What levels then are north of the porphyry dyke?

A. There is one also above the 500; starting from there cross-cuts within the ground; there was another one still further east which has been run across the porphyry dyke; this one just west of the Harris shaft showing only four or five feet of porphyry; there was another one still further west showing 11 feet. That is shown on the 400-foot level, the 500, 600, 650.

36 Q. Then back of that porphyry wall there are several levels?

A. Yes, sir.

Q. Has any stoping been done back of that?

A. Yes, sir; a large amount of stoping has been done.

Q. Has ore been taken out back of that porphyry wall?

A. Yes, sir.

Q. When was that work done?

A. That has been done since the last trial.

Q. Any opening in the porphyry wall at the time you heard of?

A. No, sir.

Q. Did you examine the mine?

A. Yes, sir.

Q. If there had been any openings in there would you have known it?

A. Yes, sir.

Q. Confident of that?

A. Yes, sir.

Q. You spoke about the Peterson stope having feeders or spurs

or something where they worked out; explain to the jury how that is on the vein?

A. All vein formations in this country are found in that way; every main vein if you follow along you cannot go far before you find a feeder coming in or a spur or slip running out from the vein. Sometimes they extend quite a little distance, oftentimes vanish in the country rock.

Q. Sometimes contain some mineral?

A. Oftentimes very rich; they do not as a general thing extend far; of course they are worked out as far as they pay.

Q. Are treated as separate veins?

A. They are a part of one vein; it is like a tree, with branches running out occasionally in the country rock.

Q. Usually of any great length or continuance?

A. No, sir; usually die away.

Mr. MORRISON:

Q. If you find a stope 26 feet wide to catch all the vein matter, do you say that it is on a spur?

A. Show me a stope and I will tell you better.

The COURT: The witness is at liberty to decline; a witness may decline any hypothetical question of that kind.

Q. What is the width of the Ashcroft stope at the 750-foot level, on the Colorado Central lode?

Mr. TELLER: That is north of the porphyry dyke, is it?

A. That opening at the widest point is 21 feet wide. It is all in country rock except a streak on the north side and a streak on the south side; there is no connection as I can see; two small streaks.

Q. A twenty-one-foot stope to take them out?

A. Yes, sir; at the widest.

Q. You refer to the Ashcroft?

A. Yes, sir; that narrows up as you go east.

37 ERNEST LE NEVE FOSTER, sworn for defendant, testified.

Direct examination by Mr. MORRISON:

Q. Mr. Foster, what is your business?

A. I am a mining engineer.

Q. What is your relation to the Colorado Central Company?

A. I am the superintendent.

Q. How long have you been such superintendent?

A. Since the 1st of January, 1890.

Q. Were you superintendent at the time of the last trial of this case?

A. I don't know.

Q. Have you had any experience in mining? State what your experience has been.

A. I have been engaged for 21 years practically; my experience

has been in mines in Germany, Italy, Wales, Cornwall, Colorado, Utah, Nevada, Oregon, Washington, California, New Mexico and Old Mexico.

Q. Have you either worked or examined mines in all the countries that you have named?

A. I have.

Q. How long have you known the Colorado Central mine?

A. I have known it about 19 years; nearly 19 years.

Q. During that 19 years, what portion of the time have you been connected with the lode in one way or another?

A. Probably for ten years.

Q. Have you made many of the surveys or superintended many of the works that have been made on that lode?

A. I have surveyed the largest portion of the mine at different times, and had a good deal to do with its development.

Q. To what extent during the last year have you been there underground pretty steadily?

A. During the last year?

Q. Since you were appointed superintendent?

A. I suppose I have been underground on an average two or three times a week.

Q. Before describing the lode, will you state what are the patented claims which the company claims to hold right at this ground in controversy? Explain on the model, if necessary.

Objected to, because not the way to prove title.

Objection sustained.

To which ruling of the court in sustaining said objection, defendant by counsel then and there excepted.

38 Q. Explain on the model the side line of Mr. Turck's Aliunde patent, the Colorado Central patent, the Colorado Central Extension and Sub-treasury patents.

A. Mr. Turck's Aliunde patent is represented by the brown color placed upon this model. It is cut off at the west end line of the Colorado Central, would extend further to the west. The bronze color represents the position of the Sub-treasury. The white for fifty feet in width here is the Colorado Central patent, survey No. 261.

Q. How wide?

A. Fifty feet in width. And directly to the north of that there is the Colorado Central Extension patent.

Q. To the north of the west end?

A. Yes, sir; to the north of the west end and to the west of the Sub-treasury.

Q. Are the workings there done as on three separate claims or one or two claims?

A. All worked as one claim, one mine.

Q. Where is the working starting point for that mine?

A. The working starting point is the engine shaft about probably 600 feet east of the Harris shaft.

Q. State if all these workings on the model which have been done

by the Colorado Central Company except the Jim Hall tunnel have been done by the underground approach from the tunnel?

A. They have been done from the Marshall tunnel, and a shaft sunk down to these.

Q. Is that portion open from the surface or from below upwards?

A. It has been commencing at the surface going downward, and those westerly workings from the tunnel upwards.

Q. What has been the reason for the failure to have further developments at the surface?

A. On account of the great depth of slide there it was unnecessary to sink a shaft right through that, since the one main shaft which had already been made further back east is sufficient to do all the development and work of the mine. It is unnecessary to go to the surface except for proof of apices, which we have done in several places.

Q. Do you know the original discovery shaft of the Colorado Central lode?

A. Yes, sir.

Q. What is it on?

A. It is on the Colorado Central lode.

Q. State how, in general terms, the lode found in that Colorado Central discovery shaft is worked from the discovery shaft west to the middle?

A. The Colorado Central discovery shaft is sunk down to what is known as the Thompson Tunnel level. From the Thompson
39 Tunnel level there is a drift driven some distance westerly. From that there was what was called the Wood shaft was sunk down to another level, and from that level the Gates or deep shaft and Gates raise was sunk right down to where our main shaft is, very close to it, not exactly over, but very close to it and from the engine, which, I say, is about 600 feet east of the Harris shaft, and on this Marshall tunnel, or four-hundred-foot level, that level has been driven straight through to the Harris shaft, further on as represented upon the model. Then there is a connection from the discovery shaft to the middle, a complete connection.

Q. On what sort of matter and material?

A. Through lode matter, crevice material and ore streaks, numerous ore streaks.

Q. State whether the Colorado Central is a wide lode or narrow lode.

A. It is a very wide lode.

Q. Since when have you been of the opinion that that was a very wide lode?

A. Oh, for probably twelve years.

Q. During these twelve years has the Colorado Central been a well-known and producing lode?

A. It has.

Q. When did you first learn that it was contended by any one who claimed to be familiar with the lode that it consisted of two or more narrow lodes?

A. Just after the last trial, in this case, probably in January, 1890,

the first I heard of it in the chancery proceedings for injunction in this court when they were decided.

Q. Do you know what the claim of Mr. Turck was as to width?

Objection to that; counsel should produce the papers.

The COURT: You will have to prove that by the record.

Q. Now, state on what plan, generally, this Colorado Central lode has been worked for the purpose of getting ore?

A. The general plan adopted is to drive levels from the main shaft and cross-cut through the whole width of the lode at different points, find out where the richest and best ore bodies are found, in fact, where the ore bodies that are sufficiently large to pay are found, and then to drift upon those and stope above the levels.

Q. In running those levels have you been particular whether your working levels carried ore or not?

A. No; we never care whether our working levels carry ore or not, and as a rule they do not.

Q. If for a considerable space you find your working level carries no ore, does that cause you to stop running it?

A. Oh, no, sir; we drift right straight ahead without regard to pay.

Q. To what length have those levels been from time to time driven without any pay streak?

A. Several hundred feet at times.

Q. Where you find them driven without any pay streak how did you work to get at a pay streak?

A. We cross-cut through the lode from one side to the other.

Q. Have you run all those cross-cuts from the north or all from the south or from both directions?

A. They are driven from both directions.

Q. Do you find any general boundaries to that lode of a different character of rock from that lode material?

A. Yes; there is a boundary upon the south and to the north, which is porphyry.

Q. Is that porphyry mineralized or barren?

A. That is barren.

Q. How many ore channels or ore measures do you find between these two porphyry dykes?

A. I think their name is legion; I could not count them up.

Q. Commencing at a given point how many are there parallel to the same section?

A. Well, at this point, right here by the Eddy cross-cut there is here a vertical ore channel running nearly in the direction of the lode. That would be one; one running nearly diagonally across it, also vertical, two; a third one running out still different, nearly vertical, three; a flat one, going up the Hoglund shaft, four; one right on the south side, five; a vertical one leaving the Hoglund shaft and dipping over to the south would be six; and this one that I spoke of on the north that comes right straight up there and is filled in by this space, this movable stope we have here (referring

to model), that is that very large ore body comes away up above the Marshal Tunnel level. There are at least six of them there, and this one in the O'Mally, is also in the same range, would make seven.

Q. So that taking a vertical section of the lode from the foot of the wash at the top of bed rock down to the 750-foot level and piercing it at different points you would strike or cross six different ore measures?

A. Seven of them workable ones; there are a good many others besides those.

Q. What are they?

A. A great many small ones.

Q. Leaving out little ore measures, are there seven workable, seven different kinds which a man could work as his own lode without interfering with the other, any one of the seven work to profit?

A. I don't think any seven men could tell what they did own, they are so interlaced with one another.

Q. Would it be possible for one measure to be timbered and to be kept separate from the adjoining ore measure?

41 A. I don't think it would without getting into a good many quarrels.

Q. Starting at Mr. Turck's works, begin and explain in the model yourself, explain the connection with the Peterson stope to the Herrick raise.

A. First, I will just call your attention again to the surface ground to where my hand is here from this Aliunde shaft and it falls off gradually right down to the top of this power shaft, from there it still falls a little and the creek flows there about where my hand is now. The ground then gradually rises to the top of the Harris shaft, and from the Harris shaft it continues to rise gradually, gaining 150 feet by the time it reaches the discovery shaft of the Colorado Central.

Below the surface of the ground the bed rock follows very nearly the same contour at a depth of from fifty to I presume a hundred feet; that contour is shown here about 25 or 30 feet above Mr. Turck's level; tunnel level at the engine shaft. It then follows off and is found, according to his own statement, and which I believe to be about correct, near the bottom of this power shaft, and also at the top of the Herrick raise, so that it comes down the same slope I showed you; the surface then follows along very nearly horizontally to the top of the O'Mally raise; from there it raises to the bottom of this little shaft in the Jim Hall tunnel, and then continues along nearly level to the Harris shaft, and from there on as nearly as I can say particularly about it, more than that it is found at the depth of about 50 or 60 feet, and there are other shafts we have between there and the Colorado Central discovery shaft and the discovery, 50 or 60 feet, it is in three or four other shafts we have between there and the Colorado Central discovery shaft and the discovery shaft itself.

Commencing at the discovery shaft we have the apex there; then we have it at the Shay shaft; then we have it at the Reed shaft;

then we have it here at the Harris shaft; all within the side lines of the Colorado Central survey No. 261.

The next place we find the apex of the Colorado Central lode or a portion of the apex, is in the shaft below the Jim Hall tunnel, and that shaft being about 12 feet north of the north side line of the Colorado Central, and under the Sub-treasury patent we come to the O'Mally raise, and we find the apex of the lode right at that point near the center of the Colorado Central patent.

In this O'Mally raise the sand and boulders have been met with. Here is one of the boulders that was taken out of the top of that raise. I took that out myself.

42 Here is another of the boulders showing that the wash had been reached there.

Here at the Herrick raise we have also raised up there to the top of the bed rock or close to it, so close that we have been able to drill a hole through to sand and boulders.

The Herrick raise also lies in the boundaries of the Colorado Central patent. A portion of the apex is also found south of the south line of the Colorado Central, within Mr. Turck's Aliunde patent, the bounds of which have already been designated; one here near the engine shaft; one at the McCloskey raise; one by a drift that was run out towards the surface here, and in all probability in this shaft; that I don't know from personal observation.

Also, the Johnson raise here is probably within 20 feet of the surface now, and this O'Malley raise was put up on a streak of ore or ore channel. The lower portion was stoped; there was ore there in sufficient quantity to pay the stoping. It didn't pay the stoping above that point, although it followed up ore and crevice material; some of it was shown you in one of these boxes, which I helped take out; several samples showing you ore.

The stope itself yielded considerable ore, and that ore body is found going down in the bottom and underneath that stope. It will go down somewhere in here, in all probability uniting with this little mill-hole or raise, which has been put up from the Marshall tunnel or four-hundred-foot level.

The Herrick raise was raised from the end of the Stuart cross-cut to as near the surface as we could get, and was raised on an ore channel showing ore all the way up. The ore in that raise was from half an inch up to as much as an inch and a half in width.

I took out ore there at heights of four, five, six, nine, eleven, twelve, fifteen, seventeen, twenty-four, twenty-five, twenty-six, thirty, thirty-six and thirty-nine feet above this cross-cut; at all those points, either in the side or top of that raise, I took out ore.

You follow that same ore channel down through the Grant raise, and through that Grant raise there is a continous ore channel; there is ore found in different points all down through that Grant raise. Sometimes you will have to go some little distance between the ore. It was not a continuous streak like a pencil would be continuous; but you find a little bunch of ore, then you find crevice

material, then bunches of ore; and in that raise, commencing at the bottom, I took it out, 1, 16, 24, 25, 28, 66, 75, 109, 125 feet.

Now, the places where I took out the ore were not the only places in that raise where there was ore; just took them out as I happened to be in the raise at different times. I generally took them out in the top of the raise. That brings you a continuous ore body
43 down from the top of the Herrick raise to the bottom of the Grant raise. At the bottom of the Grant raise there is a little drift which is driven through and connected with the Thomas shaft, which shaft is sunk from Mr. Turck's third level. The material followed in that third level. The material following in that little drift was crevice material, with some ore scattered through it. A portion of that drift, in fact nearly one-half of it, was driven by Mr. Turck's men themselves, and they followed the same slip and ore channel as we had in the Grant raise. When the drift was opened there, before this barricade was put in and the wall built up, you could see straight through; you could see the smooth slip of the wall.

Mr. TELLER: You don't mean you can see it?

A. You can see it from the underground raise to the Thomas shaft; you can see the slip broken through.

By Mr. TELLER:

Q. Was it broken through at that time?

A. Yes; broken clean through.

Just at the bottom of the Grant raise, and to the west of it, just its own width, the Dago raise from the Peterson stope comes up, and is upon the same ore channel.

Now, from that raise several pieces of ore were taken. Here is some ore and quartz that I took out of that raise; that is, this little white raise shown at this point here was taken out in that raise itself. You pass from that raise through a small manhole into the Peterson stope, and from that manhole this large piece of quartz and ore was taken. That comes from the north streak in the Peterson stope. In the Peterson stope there were a good many ore channels or ore streaks—invariably two, even three, and sometimes a great many more—and these were interlaced or joined together by small streaks of ore running from one to the other.

One of these streaks is shown on this piece here. Here was a piece out of the middle of the Peterson stope. This was barren crevice material, with the exception of a small streak shown right there, which was one of these small streaks uniting the larger ore channels together.

On the south side this stope was all the way from five to fifteen or sixteen feet in width. On the north side of that lay one ore channel, and that one was the best ore channel we had. It was most productive, had the best ore in it. On the other side, the south side, lay another ore channel. These ore channels were stoped up from the Peterson level to the 500-foot drift, and, as I say, it was carried up very wide on account of the numerous ore channels; this Peterson stope, Peterson and Wallace stope, being

the continuation one of the other, when it got to this point, became so thin, the ore in it became so thin, it was no longer valuable to mine, and the mining upon that streak or ore channel was stopped, as represented by the netting.

44 Coming westerly from it we came through the Peterson stope to the Metcalf stope. In the Metcalf stope we had more than one channel. The principal one there lying on the south side and coming up south of the ore channel found in the Peterson and Wallace stopes, between the five and six hundred foot level is what is known as the Nelson stope.

It came upon more than one ore channel, the same as the Peterson stope; here at the beginning point, here you see a vertical ore channel rising at this point and which was stoped up on a little distance, and then the flat ore channel behind it was followed up and came out south of the Peterson level and south of the Peterson stope there was a small channel of ore, which dropped down from the Peterson stope nearly vertically into the Nelson stope and made a union, as is shown upon the section here. Here was the Peterson ore channel going down nearly vertical and dropping down into the level and followed right down and dropping into the Nelson ore channel. But the Nelson channel proper went up south of that and is found here nearly 70 feet south of the Peterson drift. Now, although this Nelson ore channel was a very large one and the stope as much as 25 feet in width, it places that ore channel like the Peterson—in following it easterly came really to an end. It got so thin as to be valueless for working purposes. There was no longer a pay streak there; although there was a little ore it was too small to pay.

Now, upon the five-hundred-foot level, in addition to the Peterson and Wallace stope and Metcalf stope, there is the Harvey stope, which has been shown upon this longitudinal section upon the same plane. Now, the truth is that the Harvey stope has no connection whatever with the Peterson stope. It lies on an ore measure or ore channel, which is very much flatter than that found in the Peterson stope, and dips right back to the south and unites with the ore channel found on the south side of the lode. This flat ore channel which was found in the Harvey stope and continues down through the Hoglund shaft has numerous small ore bodies going out of it more or less vertically in different places; some of them have been worked up a short distance; others have not been touched because they have been too small to do any work upon.

This big ore channel in going down before it reached the 600-foot level got so thin that it would not pay to work any longer, and you will observe that that portion has never been stoped out. The vertical ore channel found upon the north, at the 600-foot level, was followed down through the Webster shaft to the 750, and at this 750-foot level we find a series of stopes, more or less irregular. First, we find this one that lies right upon the north, going off diagonally from that is the Asheroft stope. A little further to the east there — no less three stopes in a bunch. They are together, one standing

vertically on the north, another running off at very nearly a
45 right angle to it, also standing vertical; and a third one lying nearly horizontal in the lode, laying so flat that you can walk out of it; passing still further to the east we find another flat stope coming up behind the vertical one, which is known as the Benny stope; behind that again, on the south, right on the south drift, is a vertical stope, and going off diagonally from that vertical stope is still another ore channel, which stands nearly vertical, running diagonally in the lode. That ore channel, if continued will be found undoubtedly to unite with this diagonal one running off, and by what is known as the O'Mally workings. Thus, at these points we have 1, 2, 3, 4, 5, 6, 7 different ore channels, counting all which were workable, not to say anything of those which were not workable. The Asheroft stope and ore channel, where it was connected in the Nelson cross-cut, was very small, probably not thicker than that book, not over a quarter of an inch or half an inch; yet, on working up on that it was found to spread out into a series of ore channels, so that the stope now is about 25 feet in width.

A photograph was shown to you that shows how these small streaks, which we have in our cross-cuts, if they are only a prospect, may develop into ore bodies that prove valuable, and it is only by the development of these small ore streaks, which we get in the cross-cuts that we drive that work, are able to make this mine pay.

If we should have passed through those streaks and not prospected them any further we should not have any mine at all and we should have no litigation. The Dwyer cross-cut was driven from the south to the north and in that are found numerous of these small ore channels.

Now, from the Benny cross-cut, the Carpenter cross-cut, the Eudy cross-cut, the Forsland cross-cut, the Roberts cross-cut, the Cornish cross-cut, I have taken samples. They have been placed in these boxes, all of which I believe they have presented to you.

Q. Have you left any samples that you have not proved yet?

A. I don't know of any without they are in some of these boxes; have not been put in yet; here is the Carpenter cross-cut and these show ore in several places taken so they show large pay streaks—if they had large pay streaks we should have been stoping on them, but they show the whole mass of material between the walls of that lode is penetrated by these small channels of ore ramifying through it in a regular net-work.

Q. I want to call your attention to three or four points which I will question you on, then you will go ahead with your statement, because time is limited. Is that the copy of the plat of the Colorado Central patent?

A. As well as I recollect, it is (witness refers to paper handed him by counsel).

46 Q. How many shafts did that show at the time the patent issued?

A. That shows three shafts.

Q. All those three shafts are east of this model, are they not?

A. Yes, sir.

Q. Now, do we find the O'Mally raise supposing it to be connected by a shaft here on a direct line with the line of shafts shown on that patent, made before it was issued?

A. Yes, sir; it shows right on the center line.

Q. Now, Mr. Foster, you have claimed you have proved an apex from the top of the Herrick raise, down to the Thomas shaft and Peterson stope?

A. Yes, sir.

Q. Supposing Mr. Turck has also proved an apex from his engine shaft down, at what point do they unite?

A. They unite right in the Peterson stope.

Q. Then supposing Mr. Turck has an apex followed on through his workings into the Peterson stope, on what side of the Peterson stope do they come in, on the south or north?

A. Mr. Turck's workings come in on the south; his connection shows.

Q. Here is the Richardson winze; it breaks in on the south side of the stope; you claim an apex on the north side of the stope?

A. Yes, sir.

Q. Of the two apexes, supposing there to be two apices, the point of union is somewhere about the top of that Paterson stope?

A. Yes.

Q. On what level?

A. Just below the four-hundred-foot level.

Q. If you know the dates of the two patents, the Aliunde Tunnel, No. 2, and the Colorado Central, which is the older patent?

A. I know the Colorado Central patent was issued before the other was applied for, is all I know; I don't know the dates.

Q. Now, go ahead with your statement.

A. I was just showing these specimens. These are from the Carpenter cross-cut. Those show ore in gangue, although I won't say each one shows ore, but a large number of them show ore; also from the Cornish cross-cut I have several here which will show ore; out of the Benny cross-cut there are some that show ore; of course, they are small streaks of ore; they are not large pay streaks, simply show there is silver ore in them.

I have here from the Eudy cross-cut a few more; they either show ore or the crevice material found in that lode; most of them show ore.

On the Forsland cross-cut we have the same thing; some of them show quite a large quantity; a large piece.

47 Q. Now, Mr. Foster if these were separate veins, Mr. Turck had a separate vein here, a separate vein there, and a separate vein further north, would that mineralization appear and would you be able to pick out these specimens in the country rock between?

A. No, sir.

Q. Did you ever in the hundred feet, more or less, between the two porphyry walls, ever find spurs or feeders going into either porphyry wall, except at one point down about the 600-foot level?

A. The only point I know is the 750-foot level.

Q. You have heard the questions asked here about spurs and about feeders. Taking these smaller ore measures as spurs or feeders, do you find them, any of them, with that one exception, penetrating the porphyry?

A. None of them penetrate the porphyry.

Q. That is with that one exception?

A. I don't know whether that pentrates the porphyry.

Q. Does this mineralization cease when you reach the porphyry walls?

A. The mineralization of this lode is between the two porphyry dykes as nearly as you can tell.

Q. You have heard some reference by counsel on the other side to stoping over cross-cuts; was there ever stoping done over a cross-cut as such in any mine?

A. Cross-cuts are never stoped; you may stope over them, of course, but not longitudinally along them, as a rule.

Q. That is the stope crosses the cross-cut?

A. I know of two cases in this mine where cross-cuts are stoped on, and one is in Mr. Turk's mine, here in the No. 1 level, which is stoped here in the No. 1 cross-cut he has stoped along here. A flat stope comes down below that level, also comes up a little distance above. The other one is here at our 650-foot level; a cross-cut driven south from that is stoped up a distance there of some fifty or sixty feet in length. Those are the only two instances I know of. In other places the ore streaks, the pay streaks, run across the cross-cut and consequently you would simply stope just across that point.

Q. In Mr. Turck's, the principal works, have you examined them?

A. Yes, sir; I have examined them a great many times.

Q. If Mr. Turck at any time had chosen to have an apex by following a vertical streak and apex into the Colorado Central works, would you, as a miner, say that he would have followed an apex up from his own works?

A. I think he could have followed one up without any trouble in the Colorado Central.

Q. Point out the place.

A. Here, at the bottom of the Fisher stope, right on the north side there was a vertical streak stood there going up vertically.

48 Q. Is the bottom of the Fisher stope inside of the Colorado Central line?

A. Yes, sir. If that streak kept its course it would have brought him inside of the Colorado Central line. Then again here in the Elliott stope a streak goes in the direction my pencil shows, standing nearly vertical. I believe it could be traced up into the Colorado Central.

Q. Is there any more a true mineral streak in his raises by which he makes connection than there are in various ones of your works where you have not considered it a streak worth working there?

A. There certainly is not.

Q. Give the figures, the amount of levels.

A. Something like two thousand two hundred feet of levels; of this two thousand two hundred feet of levels there is only two hundred feet of the back of those levels stoped. There is a hundred feet on this level. There is probably sixty feet on the second level, and maybe thirty or forty on the first level. Altogether there is only about 200 feet done in the backs of the two thousand two hundred feet of level.

Q. As a miner, what do you indicate from the fact of that extent of levels with no stoping over them or with only ten per cent. of stoping?

A. I call it pretty slim amount of the mine.

Q. To take a single instance, you have heard a great deal here about the Edwards cross-cut being barren for over sixty feet, almost barren clear to its breast. I will ask you whether there could be any more ore practically found in the levels that go west from that point, both from the Edwards cross-cut, and from the level below, whether practically you get at any more pay ore than you would if you stoped directly above the Edwards cross-cut.

A. Mr. Turek's level going west from the Edwards cross-cut here is as entirely barren as the Edwards cross-cut itself in the level. There you find a very similar kind of material to what you find in the cross-cut.

Q. Has he ever done any stoping at all except upon the plane and line of a vertical section on which he has endeavored to prove down into the Colorado Central works?

A. Not that I am aware of, with the exception of this flat streak here. There is a flat ore channel that ran off there through his No. 1 cross-cut; he had a little stoping on that.

Q. From the time this engine shaft began sinking and these cross-cuts began going north, I will ask you if there is not a regular series of cross-cuts from that engine shaft started out every hundred feet or less.

A. There is one shown down here at the fourth level 35 feet long.

Q. That is now filled with what?

A. Filled with water now.

49 Q. During the time that he was sinking those shafts and running those cross-cuts, was the Colorado Central commonly known to be working down below in front of him?

A. Yes, sir; working to the north.

Q. Describe what extent of his work has got into the Colorado Central ground north of his line?

A. All of his work below the first level, with the exception of a small portion at the east end of No. 2 level, the south drift at the third level, and the cross-cuts in main shaft, portion of the cross-cuts in main shaft. All the rest of the work lies under the Colorado Central side lines, and all the stoping that has been done, with the exception, perhaps, of a portion of the Bruce stope and the Thompson stope, is all done within the Colorado Central side lines.

Q. From your knowledge as a mining superintendent are you able to give a general idea of the cost of sinking a drift in a lode of that character?

A. Yes, sir; I think I could.

Q. Well, now, I would ask you if he took out enough ore out of all his works that lie within his own boundaries to pay ten per cent. of the amount expended?

Objected to, and the court sustained said objection; to which ruling of the court in sustaining said objection defendant by his counsel then and there excepted.

Mr. FOSTER continued as follows: There is one place here I would like to call attention to; that is where this big stope comes out on the 500-foot level; we have here four ore channels that are worked on one small one here to the north; this large main one which runs off diagonally and goes over on to the south side from the north; the ore streak that is driven on is as much a cross-cut as any cross-cut in the mine; it is driven diagonally from one side to the other; the only difference between that and some of the other cross-cuts is they are driven more nearly at a right angle. Taking this stope out (referring to model) you see behind it still two more ore channels, this Nelson middle drift ore channel showing there four different ore channels which have been worked upon profitably. At that point this middle ore channel, like many others, in working away has faded away and become valueless and insufficient quantity of ore to pay. The same has been the case on the south side. Also upon this north here—even this immense body of ore we had stoped for probably 300 feet in height faded out in going westerly so that out here it is not of sufficient value to pay. It got down to be so small that you can't see anything in it. It got down to what has been called an insignificant streak.

Q. Supposing Mr. Turck has a well-defined crevice stoped at this level, another one coming down, you have one down here, the whole series of them from top to bottom played out as practical paying stopes as you go east?

A. Yes, sir.

Now there is another thing here (showing). This Bruce stope of Mr. Turck's is very nearly up to bed-rock. The bed rock will lie about as I hold my pencil. You see the top of that Bruce stope is within twenty or thirty feet of the top of the bed rock, and that continued up will come here to the surface a long ways north of the power shaft, showing that the width of the lode at this point must be great, even according to Mr. Turk's working alone, without taking into consideration ours, which lie further to the north.

There is also here at the Marshall Tunnel level what is called the Reynolds mill-hole, which has been carried up and shows that the lode is a good deal wider there and has more ore channels than shown by the drift. The McClosky level run on the McClosky level was supposed to be on the south side of the lode. We missed the ore. The ore went up a little to the north of us. The channel which we have followed was not as good as the channel the Mar-

shall tunnel had been run on between those two ore channels. There is a little bend shown here which has been mentioned but little which is the diagonal streak that runs off across the lode in that direction. Between that and the Harris shaft there is still another one having a different direction and a different dip, dipping to the south. Down at the Cornish cross-cut we have the channel on the south stoped up a height of 17 feet. Going off from that was a small flat streak

Cross-examination of ERNEST LE NEVE FOSTER:

Q. You are now the active manager of this mine, are you?

A. Yes, sir.

Q. You have been since when?

A. Since the first of January, 1890.

Q. You have been actively connected with the mine for 10 years you say?

A. I have been with the exception of three or four years; from the beginning of 1887 to the beginning of 1890 I had nothing really to do with it.

Q. You made some surveys in the meantime?

A. One or two.

Q. You were not in the employ of the company?

A. No, sir.

Q. Previous to that how were you employed?

A. Surveyor and cashier, assistant manager.

Q. You occupied the position Mr. Chase now occupies?

A. Yes, sir.

Q. Did he succeed you?

A. Yes, sir.

51 Q. Previous to that time you had something to do with the running of these levels, did you?

A. Yes, sir.

Q. How far west of the discovery shaft were the developments when you commenced your connection with the mine?

A. I don't think they exceeded over three or four hundred feet; I would not be sure that is exact.

Q. So that the biggest part of this work has been done under your direction or oversight?

A. Well, to my knowledge.

Q. Up to that time?

A. Yes, sir; to my knowledge.

Q. And you regard it as one great lode from porphyry wall to porphyry wall?

A. Yes, sir; one large lode.

Q. How far apart are the porphyry walls at the discovery?

A. I can't tell you at the discovery, nigher the porphyry on the south; at the discovery I think the obsidian is found to be 50 feet north I think of the discovery shaft.

Q. North of the discovery shaft?

A. Yes, sir.

Q. But you haven't seen it at all south of the discovery?

A. Not at the discovery shaft.

Q. Where do you first strike the south wall as you go west, the south wall now, what you call the south wall?

A. That would be a very difficult question for me to answer at the present time, because the immense amount of work that has been done upon that lode back this way, why a great deal of it has passed out of my recollection.

Q. Exactly how many levels have you back there?

A. I could not tell you the number of levels we have back there. There must have been a dozen or more.

Q. What depth are you there from the discovery?

A. At the discovery we are about four hundred feet deep.

Q. Does the Marshall tunnel cut this?

A. It does not cut the Colorado Central lode under its survey; it cuts it to the east of it.

Q. Then when you reach the Colorado Central by a level——

A. We reach the Colorado Central by the level driven westerly from the Marshall tunnel upon the same lode or the extension of the same lode.

Q. Have you much stoping upon that ground east of this ground in controversy, east of it as shown here?

A. Yes, sir; we have a very large amount.

Q. Can you tell me when the Carpenter cross-cut was run?

A. It was run in 1886.

Q. Are you sure about that?

A. Yes, sir; I am sure a portion of it was run in 1886 or the beginning of 1887; it was just before I left the mine.

52 Q. How much of it was run in 1886?

A. Well, I should judge that about one-half of it was.

Q. When was the Brown cross-cut run?

A. The Brown cross-cut, I should say, was driven somewhere about the same time, I cannot recollect the exact date of it, but about the same time, somewhere about 1886.

Q. Clear through?

A. No, sir; not clear through. It was driven about ten or twelve feet beyond the Sweed drift at that time, and in January of '90 it was extended.

Q. Since the trial?

A. Yes, sir; it was extended to its present breadth in January, February and March.

Q. When was the Benny cross-cut run?

A. The Benny cross-cut was commenced about, I think, 1884; either 1883 or 1884.

Q. How much of it was run in 1884?

A. Well, probably, twelve or fifteen feet.

Q. When was the balance of it run?

A. I think the balance of it was run since 1887.

Q. Run in 1888, was it not?

A. Possibly in 1888, I don't know the time when it was run exactly. I was not in the mine much at that time.

Q. Now, you say you regard this all as one lode?
A. Yes, sir; as one very large, wide lode.
Q. I believe you stated it grew wider as it went west?
A. No, sir; I don't know as I made that statement.
Q. Some witness did, I thought it was you. What do you say about it; does it or does it not?
A. Why, it is wider just opposite Mr. Turck's shaft than any other point we have opened it out.
Q. Is that level here, that will be your east level, is that—what do you call it?
A. That is the four-hundred-foot level.
Q. The Marshall Tunnel level?
A. Yes, sir.
Q. Is that run on its west end on the wall?
A. No, sir.
Q. When it makes that turn does it leave that wall?
A. It has left the wall before it makes that turn.
Q. Tell us where it leaves the wall?
A. As well as I recollect, it leaves the wall just about this point.
Q. That is east of the Brown cross-cut?
A. Probably ten or fifteen feet east of the Brown cross-cut.
Q. That is right at the turn, it would be about 20 feet?
A. Say 20 feet; somewhere along there.
Q. Why was it run, was there any ore in here?
A. No, sir; there was no ore.
53 Q. What is it run in?
A. In the crevice.
Q. What is the material through which it is run?
A. It is the crevice material of the lode.
Q. Is there any mica schist in the lode?
A. In some parts of the lode there is mica schist.
Q. What is that?
A. That is a little cross-cut running across there.
Q. Does that reach the wall?
A. I don't think it has.
Q. Is that level below it, pretty nearly under the Sweed drift, is that on the wall?
A. No, sir; that is not on the wall.
Q. Is the working east of that on the wall, this here?
A. The drift at the end of the Valle cross-cut is on the porphyry wall.
Q. Do you call that the Valle cross-cut?
A. Yes, sir; that is the Valle cross-cut; it is from here northerly is called the Valle cross-cut.
Q. When was this tunnel level run west; when was this work west of the Brown cross-cut done?
A. I should think that was done as long ago as 1886.
Q. You think it was done as long ago as that?
A. Yes, sir; I know it has been done for a great number of years.

Q. Was it before or after Mr. Turck had gone down onto his third level?

A. That I could not say.

Q. Or was it while he was doing work there?

A. That I could not say; I don't know.

Q. Do you know when Turck got down to what is called his third level?

A. No, sir.

Q. You made affidavits about it?

A. I have made some.

Q. Can't you give us something approximately; was it in 1883, 1885 or 1886; what time?

A. I don't think I was ever in Mr. Turck's mine till 1885, maybe later, I won't say.

Q. Now, your theory is that these workings commenced at Turck's upper workings, following on down this ore measure right here; this is the same vein this is on here, this north one?

A. It is on a portion of the same vein.

Q. You claim these things lying in here are on the same vein?

A. I claim all these ore channels running in various directions through the mass of the crevice are all on one vein.

Q. You don't think there is a separate vein here; it is all one?

A. Yes. I am not prepared upon the developments to
54 state whether that is on the same vein or not, it may be a spur running off from it.

Q. Do you find any connection with the ore body on the south side of the porphyry wall?

A. There is one point where we come up right at this stope where we start south of the porphyry and come up on the north side of it.

Q. In how many inches of it?

A. I have not yet been able to fully determine.

Q. That may be a spur, and that may be the point where it comes into the vein?

A. Yes, sir.

Q. When you say you have a well-defined north wall, you mean provided that it is not a part of the lode, didn't you; that you find north of it; didn't you always?

A. If that is a part of the Colorado Central, then you have not got the wall; if it is a spur from the Colorado Central, we have got the wall.

Q. If it is a part of the Colorado Central in a spur, then what?

A. Then we should have the wall on this other side; that is all.

Q. How do you know?

A. Because there we have got barren rock.

Q. Have you worked into it?

A. We have not worked further down the side of the level.

Q. You had porphyry on the south side, was not that porphyry barren rock?

A. No, sir.

Q. What was it?

A. That was all crevice material.

Q. Between those two levels here lies the porphyry dyke, this barren rod?

A. Yes, sir.

Q. You called that, at the last session of the court, your wall?

A. No, sir; I did not.

Q. You were not a witness; haven't you heretofore called it your wall?

A. Yes, sir; and I call it the wall now.

Q. You say that if that is a part of this lode, the north part of the Colorado Central; you have got your wall; what is your wall composed of; where is your wall now; what is it?

A. I think this is it, the rock here.

Q. How do you know?

A. By looking under it.

Q. How does it differ from the rock you find on the south of that level?

A. It is very much harder.

Q. In how many places have you broken into it?

A. That would be an impossibility for me to tell.

55 Q. Have you any cross-cuts into it?

A. No, sir; we have run no cross-cuts.

Q. If you should find another body of ore, would you say that was crevice material?

A. That would depend entirely upon the conditions; a great many conditions make up these things.

Q. You don't want to say now what you call it?

A. No, sir.

Q. You say there is no country rock between the south wall and the north wall of the Colorado Central mine?

A. There are some small bars of the country rock which has not been thoroughly changed, and which might possibly be called country rock, and yet, they are a portion of the vein filling, therefore a portion of the crevice material.

Q. Do you mean by that, when you say vein filling, they have been filled in the usual way veins are filled?

A. That depends upon the way you consider veins are filled.

Q. How do you consider veins are filled?

A. I think they are filled in various ways.

Q. What theory have you got about the filling of this one—what theory?

A. Well, I believe that this vein was formed by some crack, formed in the surface by eruptive powers, and that in the formation of that crack a number of subsidiary or smaller channels were formed through this.

Q. Cracks, you mean?

A. Yes; cracks were formed through this zone of rock, which is now altered, and which formed the vein; that through all these various cracks the gasses or the waters percolated, and, as a rule, changed the whole of that zone into this crevice material, and that in some portions the action was not as great as in others, and left

the original rock in an almost unaltered condition; that is, left bars of almost unaltered rock in the middle of the vein material, and that the ore bodies or ore channels—streaks, as we call them—were deposited in the several cracks, and that they are connected together by these smaller cracks.

Q. Which way do you think those cracks run?

A. As a rule they run in the general direction of the lode northeasterly and southwesterly; but of course, in the breaking up of that large mass here, some of them ran crossways; some of them lay flat; they lay in every direction, forming an intricate connection, forming an intricate network of channels through which the ore was deposited.

Q. These cracks, I suppose were bigger in some places than others?

A. In all probability; I was not there to see.

Q. Your theory would leave you to judge, because you find bigger bodies of ore in some places?

A. Yes, sir. Then I would like to say a portion of this
56 action was undoubtedly an interchange of particles; that is to say, that the particles in the original rock were changed, and ore deposited in their places.

Q. Now, then, do you think you have run these levels on those cracks?

A. Don't think we have kept to any particular crack.

Q. Do you think you have got on any cracks at all?

A. Yes, sir, I do.

Q. Do you think, for instance, your fourth, fifth and sixth levels were on cracks?

A. Portions of them; not following any particular one.

Q. For instance, you think you left the crack on this tunnel level?

A. No, sir; the porphyry bends right around.

Q. The other one above, I mean.

A. There the lode was so barren and worthless we ran anywhere.

Q. That was as barren along the wall as it was?

A. Yes; in fact, from that point on.

Q. How far west of the Pollard shaft is it barren?

A. It has never been enough to pay from the time it left this millhole, about fifty feet east of the Benny cross-cut.

Q. It was barren from that on?

A. Yes, sir.

Q. Did you hug the wall along here?

A. No, sir; not from here.

Q. What is the character; you say it was not the same?

A. Very similar.

Q. Was there any purpose in giving it that turn there?

A. No, sir; I know of no object at all.

Q. You did not run it?

A. I was not in charge of the mine.

Q. Tell us where these bars of unaltered, or at least partially unaltered, granite or countr y rock occur?

A. They occur all over the mine, from one end to the other. It would be impossible to designate spots.

Q. How big are these bars, the largest you have?

A. We have never gone around to determine their exact size.

Q. Tell how thick?

A. We have gone through them fourteen or fifteen feet sometimes.

Q. Could you locate any of them?

A. No, I don't believe I can locate any at the present time.

Q. What do you call them when you come to them, country rock?

A. No, sir; call them a part of the crevice.

Q. How do they differ from the part of the crevice which you call pay material?

57 A. They do not differ materially, except being a little harder. They have the same constituents.

Q. Did you ever see any gneiss in there?

A. Yes, sir.

Q. Where?

A. I cannot designate the points, because they occur in numerous points throughout the vein material.

Q. How big a patch of gneiss have you ever seen?

A. It is just exactly as I said with regard to these hard bars, you cannot give the boundaries of them because we never follow them around; we get away from them as fast as we can, because we know we shall find no pay material within them.

Q. Before I leave that I want to call your attention if there is a big vein in there, through there, and there has been a large amount of action of whatever it may be that creates veins, would you expect to find some indications of veins outside of the lode itself?

A. That might or might not be.

Q. In the surrounding casing of the rocks?

A. That might or might not occur.

Q. Does it ever occur?

A. I have never noticed in this vein.

Q. I am speaking not about outside; of course, you could not notice in this vein if you were starting out with the theory that the porphyry wall are outside walls of the vein?

A. Yes, sir.

Q. Will not the lode, the vein, impregnate the porphyry?

A. No, sir; it does not impregnate the porphyry.

Q. Does it not occur that there is an impregnation outside of the ore body, outside of what is recognized as the boundaries of the vein?

A. Not in this lode, I know.

Q. I am asking you about the general theory?

A. There are cases where it occurs.

Q. Is J. A. Phillips on ore deposits regarded good authority?

A. One of the best.

Q. Do you know Mr. C. Le Neve Foster?

A. I ought to; he is my brother.

Q. Would you regard any statement he made as entitled to credit?

A. I should, most decidedly.

Q. Let me read you what this says. "Impregnations differ from other metal-iferous deposits in not possessing any sharply defined outlines and they consequently merge gradually into the enclosing rock.

Although met with in formations of almost every age, they occur most frequently in ingenious and other crystalline rocks, in
58 many instances the rock forming the matrix retains its general characteristic structure, the ore being disseminated through it in a more or less finely divided state. In other cases the rock becomes, to some extent, decomposed, a portion of its constituent minerals being converted into various products of alteration."

"Deposits of this class may occur either independently and alone, or associated with others of a more definite character. Those which are apparently independent, and without any connection with other metal-iferous deposits, extend for varying distances into the surrounding rocks, which, within certain limits, are impregnated with ore—impregnations which, on the contrary, are directly in connection with other metallic deposits, may either form portions of the wall rock of a vein, or be distributed along lines of fissure in communication with a lode. The ores constituting impregnations may be distributed through the rock in various forms. They may be present either as crystals or as disseminated crystalline patches, or the particles may be so finely divided as to be invisible without the aid of a powerful lens. In other cases the ores may assume the form of minute spherical aggregations, as in the Bunter sandstone at Commern, in Rhenish Prussia. It not infrequently happens, also, that rocks are stained by oxide of iron or by various copper compounds to considerable distances from large deposits of the ores of these metals; but in the majority of cases impregnations of this kind possess no commercial value. Impregnations of cassiterite occur in the mines of Saxony and Bohemia, as well as in Cornwall, where, under the name of carbonas, they sometimes form valuable deposits. According to W. J. Henwood at the St. Ives Consolidated mines, a carbona joins the Standard lode at a depth of 78 fathoms, and at its point of junction therewith the connecting surface is not above four or five inches square. From that point it has been worked for a distance of 120 fathoms in length, with a constant inclination downward, until it reaches a depth of nearly 100 fathoms."

Q. How much is a fathom in a mine?

A. Six feet.

Q. I knew, but I wanted the jury to know.

"Its greatest vertical extent is nearly ten fathoms, and its extreme width about the same; but the average dimensions may be taken at four fathoms high by ten or twelve in width. It exhibits few of the usual characteristics of a lode, being bounded above, below

and on either side by ordinary granite. The deposit itself is chiefly composed of feldspar, quartz, schorl and oxide of tin, very irregularly distributed through the mass. In some places it contains in addition fluorspar (which is not present in the adjoining lode), chlorite, chalcopyrite, erubescite and iron pyrites. Throughout this mass there is a gradual transition from the composition of granite to that of carbona."

59 "An impregnation of granite by tinstone, which occurs at East Huel Lovell, in the parish of Wendron, Cornwall, has been very clearly described by C. Le Neve Foster."

Q. Is that your brother?

A. Yes, sir.

Q. Then the figure represents the impregnation of tin ore at East Huel Lovell, in which *a b* is the leader or divider, a small vein composed of quartz and ferruginous clay, varying from one-fourth to one-half inch in thickness. The dotted portion is the tin stuff, outside of which is the ordinary granite of the district. This granite is well marked, and encloses large crystals of orthoclase; while the stanniferous portion consists of a mixture of quartz, mica, gilbertite and cassiterite, with a little fluor-spar, iron pyrites, copper pyrites, copper glance, etc.

Q. Now have you ever looked at this?

A. Many a time, sir.

Q. You have read it?

A. I say what he says there is perfectly correct; the fact is that the deposits do occur—the impregnation.

Q. Did you ever examine this mine, the East Huel?

A. No, sir; I never examined that mine.

Q. "Gilbertite, a crystalline alteration product of feldspar, is frequently abundant. There is no wall or selvage between the tin-bearing mass and the surrounding granite, the two gradually merging into one another; and, following the leader along its strike, the tin-bearing rock decreases in width until at last both walls of the vein are composed entirely of granite."

Q. You say you know any such instance in this country as that?

A. No, sir; I don't know that I do.

Q. I have here an affidavit which you made.

A. Let me have it, to look and see what it is about; I have made so many affidavits.

Q. I will read from the copy on the second page: "That the entire length of said cross-cut No. 2 is driven through what affiant believes to be crevice material of one large vein, with a bar of about ten feet of mica schist rock between the second and second or third long level to the breast of said cross-cut." Did you use that language?

A. Yes, sir; that is just what I said then.

Q. "That said mica schist rock was frequently found in stopes in immediate connection with ore?

A. Yes, sir; I said that; I told you that two or three times to-day.

Q. "Cross-cut driven No. 4—and the last thirteen feet through a horse of gneiss rock." Show the jury where that would be.

A. Yes, sir; cross-cut No. 4 is driven from the bottom of Mr. Turck's shaft; it is not put on this model.

60 Q. Driven the very same as the one above it?

A. The same as this one.

Q. That is where you say you found thirteen feet of the horse or gneiss rock that was at the end of the cross-cut?

A. The affidavit will tell you.

Q. The cross-cut is 35 feet long, you say so here somewhere?

A. I have been in that.

Q. Since the time you made this affidavit?

A. Yes, sir; at that time the cross-cut was about 35 feet long.

Q. Well, now, then, you call that a horse; was there any vein on the other side of it—any vein material?

A. I believe there was. I here state in the affidavit the rock in the north end of this cross-cut has more the appearance of country rock than any rock found in any of the cross-cuts of the defendant above. It is, as affiant believes, the only bar or mass of country rock found in the survey and inspection of defendant's workings, but affiant does not believe said cross-cut No. 4 to have reached the north wall of the lode." There is the north wall or the other wall of the large lode.

Q. Do you mean to say there was a vein in there—where?

A. Exactly at the point I said there in the affidavit.

Q. There is a horse anyway of gneiss rock?

A. Yes, sir; that is one of the horses.

Q. You don't know how long it is; you don't really know how thick it is?

A. I know it is thirteen feet.

Q. It may be thicker. I understand they have found mineral beyond that since. "Further affiant carefully examined the long cross-cut No. 2 and the long level. Would this be No. 2 or No. 3 levels?

A. Yes, sir.

Q. "They are driven at an angle to each other, and are not, as affiant believes, upon the same ore seam; have no connection with each other, except both are driven through the hard main lode. One wall of the lode in any of them upon which to take a measurement, etc. You say now that the two levels are run on a different ore measure?

A. Yes, sir; I do

Q. You still stick to that?

A. Yes, sir.

Q. "At the east end of the level, east from corner No. 3 (that is on the next page) at the east end of the level an ore streak of solid ore about two or three inches in width and at the point marked X?

A. Yes, sir; I remember that very distinctly.

Q. "Was a quartz streak six or eight inches in width at both points? They were working on a good streak." Now that was made on the 16th of March, 1888, was it not?

A. Yes, sir.

61 Q. Now show where X is?

A. That point X was this large bend in Turck's level just at the Thomas shaft, and the same streak that runs through from the Thomas shaft to the Grant raise, at both, especially the lower point; the lower point is this one on No. 3; the other was on No. 2.

Q. One right above the other?

A. Approximately.

Q. Are they on the same ore body?

A. No, sir.

Q. On different ore bodies?

A. Yes, sir.

Q. At both points, especially where you go on a good pay streak, you still believe that?

A. I know they were.

Q. So do we, we agree on that; don't you know those two stopes are connected from the third level up, you have heard that?

A. I have heard it stated.

Q. The connection of the stope is no reason the same ore body is followed?

A. No, sir; not even when it is connected on ore, it may be one of these small subsidiary channels.

Q. Even when connected not the same thing?

A. Not necessarily; no, sir.

Q. "Affiant further says"—on the next page—speaking of points *a* to *b* and *b* to *c*, those are the points you have pointed out on the north wall?

A. I presume so; I don't remember where these points are exactly; if I had the plat I could show them.

Q. I won't waste the time to have you point them out. I intended to, but the time will hardly permit. You have had a good deal of experience in mines?

A. Yes, sir; for twenty-one years I have been engaged in it, done nothing else.

Q. What do the writers on geology say about lodes appearing in clusters or being associated with one another; in other words if you find a lode, don't you expect to find another near it somewhere?

A. Somewhere in the vicinity.

Q. Were you connected with the Marshall tunnel, in any shape, when it was being run?

A. No, sir.

Q. Do you know anything about the location of the lodes that were made in that vicinity? Look at that survey plat.

A. In the vicinity?

Q. Yes; right in the neighborhood of the Marshall, of this, see whether the whole face of the mountain is covered and see whether——

A. The whole face of the mountain is covered with loca-

62 tions on every little seam and streak. There are, I might

say, at least twenty locations upon the Colorado Central vein itself as different lodes. At the time when they were made—they were made back, I suppose, from 1865 up till the present time.

Q. Do you know how many locations were made in running the Marshall tunnel?

A. I don't know the exact number; I know the lodes in the tunnel are numbered up to No. 10.

Q. As they run there?

A. Yes, sir.

Q. Look on there?

A. Yes, there are two of them here; that is all.

Q. Seven or eight?

A. There are the—that was one——

Q. I won't bother to take my time, as I am limited. How are those locations made generally, parallel with each other?

Objected to because not cross-examination or material.

The COURT: Oh, yes; it is both.

To which ruling of the court in overruling the said objection defendant by its counsel then and there excepted.

Q. They are made intersecting and interlacing with one another and they have a more or less parallelism.

Q. What is the general direction of the locations in that mountain?

A. About northeast and southwest.

Q. About the same as the Colorado Central?

A. Yes, sir.

Q. You have made a good many surveys on the mountains yourself for different parties?

A. Yes, sir; I have made a good many; located claims as mineral surveyor.

—. ——.

A. To locate claims.

Q. Do you make any distinction between a vein and a lode?

A. No, sir; no special difference; we use the words interchangeably very often.

Q. As a mineral surveyor you are compelled to certify there is a lode?

A. No, sir; we have not to certify anything.

Q. Don't you certify to anything nowadays?

A. I haven't made a mineral survey for the Government for two years.

Q. Could not say what is required?

A. I never have; I know claims upon that mountain that there is no vein, sunk through the wash only, and they have obtained patents.

63 Q. You spoke of a spur; state to the jury what you call a spur; what is a spur?

A. A spur is a mineralized portion of the vein that starts off into

the country rock from a main fissure and usually follows more or less, a cleavage plane of the rock itself.

Q. Don't always, does it?

A. It is not obliged to, but usually does.

Q. Whenever you find a body of ore going into another body of ore, that is if you call it a lode, do you call it a spur?

A. That depends entirely upon the surrounding conditions.

Q. What are the surrounding conditions to make it a spur?

A. Well, I can't tell you what are the ones to make a spur; they differ in different cases.

Q. If it ran for one hundred feet out would you call it a spur?

A. I might; it would depend upon all the conditions; there are so many conditions in mining you can't lay down any strict rule with regard to spurs.

Q. What is the longest spur you ever knew?

A. I could not tell you.

Q. Is it unusual to have a spur fifty, seventy-five, one hundred feet going into a large vein?

A. No, sir; I don't think it would be.

Q. You said you thought that might be a spur that runs parallel for some four hundred feet?

A. It runs parallel for some distance there; yes, sir.

Q. Still you thought that might be a spur?

A. Yes, sir; I do.

Q. A spur may be four or five hundred feet long, may it not?

A. Yes, sir.

Q. What do you call a dropper?

A. A dropper is a vein, I won't say a small vein necessarily, but it is a vein coming down from the surface and connecting with other veins, usually smaller than the vein itself, and drops into it, and is called a dropper.

Q. Sometimes they are called what else? Those that come in from above you call them feeders, don't you, sometimes?

A. Well, they may be called feeders; you may call them anything you please. They are called separate veins; sometimes they are called by miners droppers or feeders.

Q. Technical books call a dropper something that drops out of the vein?

A. I won't be positive what the books call it.

Q. I understand the miners sometimes call them droppers when they come in that way? That is, where a body of ore comes down into the vein?

A. Yes, sir; they drop into the vein and may drop out also.

64 Q. Is that an unusual occurrence in this country?

A. I have seen those things occur.

Q. Frequently?

A. With considerable frequency; yes.

Q. Would you call a location made on a dropper a proper location as a mineral surveyor?

A. Yes, sir.

Q. Would you think that was perfectly proper to allow a location on a dropper?

A. Yes, sir.

Q. Frequently has little length?

A. It may have little length, may have great length.

Q. Frequently they are like a little chimney, are they not, where there has been a little crack and the ore has gone to the surface?

A. No, I don't know——

Q. You never knew of any of that kind?

A. No, sir.

Q. Did you ever know of any case of ore going into the overhanging rocks in that shape, where the vein did not go to the surface; do they always go to the surface?

A. No, I don't think they have always got to the surface.

Q. They may go to the surface, or may go part way and disappear?

A. They would be more correctly then a part of a lode. Miners call it a spur when it comes on a strike. It may come in on the strike or may come in on the dip.

Q. It usually has a different strike, a spur from the vein itself?

A. It very frequently has a different strike; not always.

Q. These terms are rather indiscriminately used by miners, are they not?

A. Yes, sir; they are very elastic, most of these terms.

Q. You made another affidavit on the fourth day of September?

A. Very probably.

Q. The same year, 1888; turn back there; you refer in that to the affidavit I have shown you?

A. Yes, sir; that is my affidavit, at least that is a copy of it; that is not the affidavit itself, that is a copy of the one I made.

Q. You said in this affidavit you had no reason to change the statement formerly made by me in the affidavit in said suit; all the cross-cuts through crevice material; such do not indicate a break in the continuity of the vein" —that you said?

A. Yes, sir; I said it.

Q. You admit there is some country rock?

A. Most decidedly; I said so.

Q. Come here to this bend in the third level; you speak about its being walled up there?

A. Yes, sir; it is walled up in the third level.

Q. Have you got any wall down below?

65 A. We have not; Mr. Turck has by the side of the Thomas shaft.

Q. Did he wall it, or you wall it?

A. He did in the same case.

Q. What is the apparent purpose of the wall?

A. I think it is for the purpose of hiding the streak upon the north, which I spoke of in that affidavit; of which a number of witnesses have spoken it passes.

Q. If it was necessary to examine that could not you get an order of court?

A. Oh, I presume so; I was not in there until just two days before we had to come down.

Q. Didn't you get an order to run this, even here, twenty feet?

A. If I so desired.

Q. You didn't so desire?

A. I didn't run it.

Q. Fifty feet; would that fifty feet bring it to the Benny cross-cut?

A. No, sir.

Q. How much would it lack of it?

A. It would lack about 35 feet.

Q. How far further over there?

A. The order was from the cross-cut, not from the shaft.

Q. Your order was to run to the vein?

A. If we wanted to, to run on this vein north fifty feet.

Q. Was that all the application you made; that was all the application you made; the application was for fifty feet; you concluded afterwards you would not run it?

A. Yes, sir.

Q. Is the breast of that exposed under the Grant raise?

A. Of course we drifted in there.

Q. That is open there now, isn't it, so it can be seen what you call that Grant ore measure?

A. Yes, sir; you can see the ore measure of the Grant, the Grant raise.

Q. There is nothing that hides that; there is no wall that hides it so but what you can see that ore measure?

A. No, sir; there is no wall in there at all.

Q. So you may see this ore measure which you say comes to the surface?

A. Yes, sir.

Q. How big is that at the foot of that shaft, that raise?

A. The whole width of the raise is in crevice material.

Q. The whole country is in crevice material?

A. No, sir; the whole country is not in crevice material between those porphyry dykes.

Q. I mean, between the walls?

A. That is different from the whole country.

66 Q. There is some north of it in crevice material.

Q. What I want to get at right down is that ore measure?

A. The ore measure proper may be probably a foot big.

Q. And what length is it developed on its course?

A. It is developed for something over thirty feet.

Q. Where is that development?

A. In fact, I might say it is developed for a while longer than that, because it is developed along here in Mr. Turck's third level also.

Q. You think the same ore body comes into the third level there?

A. I have no doubt about it; I know it.

Q. You were present when this run around this turn?

A. Yes, sir.

Q. What did you say about the ore body there?

A. There was an ore body followed around that bend, and after it got around about twenty feet or so it got a run out from that ore body; about sixteen feet from the Thomas shaft there is another one starting off, apparently nearly parallel with the third level; it has about two inches of ore standing there to-day.

Q. Which way does that run?

A. It is running southwesterly; it is in the level; it shows in the level running southwesterly across the level.

Q. Do you think that stope carried up would strike it?

A. I think possibly it might.

Q. That stone carried up would come into the level?

A. It would come south of the level.

Q. You said you saw the ore measure in the level?

A. The ore measure runs diagonally from the level diagonally across it.

Q. Put your ruler the way it runs?

A. As near as I can tell, it runs something about that direction; but with only facts to determine it upon you can't determine it, not accurately; can take a general direction, that is all.

Q. Did you see a slip?

A. There are slips everywhere throughout that vein.

Q. That ain't the question; did you see any there?

A. Yes, sir; there are a lot of them.

Q. What was the extent of that mineral, streak of mineral, through there?

A. It was probably as long as that stope shows—somewhere about a hundred feet long.

Q. Which stope do you mean?

A. The Benny stope, Turck's Benny stope.

Q. This stope?

A. Yes, sir.

Q. You stated, when you were there the other day, there was no connection between those two?

A. No, sir; there was no connection.

67 Q. Do you think if continued work be done, run from one to the other, you would be able to connect?

A. Without doubt?

Q. On ore?

A. Very probably on some stringers of ore.

Q. You say a connection of one stope with another, even on stringers of ore, don't make it the same ore body?

A. Not absolutely; what I call an ore body is a large streak.

Q. If connected by small ones, is it a common thing to find?

A. Yes, sir; very common; it is very frequently the case that the vein will commence upon one wall and gradually pass over to the other, and when it comes there it peters out and you have to jump from one to the other side again and repeat that operation.

Q. A great number of ore bodies in a vein does not prove it is not a vein?

A. No, sir; it proves it is a vein; it proves it is a large lode to find a large number of ore bodies scattered through a wide place.

Q. If you found two or three ore bodies and found this was above it, separate and distinct?

A. No, sir; of course not; it would not prove it was not a separate and distinct vein.

Q. Suppose you find in Mr. Turk's third level there are ore bodies, does that argue anything against it being a vein?

A. No; it does not argue against it being a vein, and the more you find this paralleled the larger will be your vein.

Q. I want to ask you about the surface of that a little.

A. Yes, sir.

Q. Now this is the main ore measure you found on that level; the one they followed on that stope?

A. That is the largest ore body I found on that level.

Q. It is the ore body a good miner would have followed if he was running for ore?

A. He would be very foolish if he did not follow ore wherever he found it.

Q. The Pollard shaft goes north of the Colorado Central Extension patent, does it not?

A. No, sir; it comes within the boundaries of the Colorado Central Extension as patented, as the boundaries show patented.

Q. Look at this map and see if that is correct as to the boundaries of the Colorado Central Extension as patented, not as claimed; is not that the patent of the Colorado Central right around here; is not that correct?

A. Well, there is the side line of the Colorado Central Extension runs right up to this figure B.

Q. That is as platted? That is excepted from the patent?

A. The surface of the ground is excepted from the patent, but not the lode.

68 Q. You did not get any lode there?

A. I think we did.

Q. I think you did not.

Q. Does it come within the ground excepted here?

A. It comes within the boundaries as excepted, not within the lode.

Q. It falls within the ground as claimed originally by the Colorado Central?

A. Yes, sir; but not within the surface ground that was conveyed in that patent.

Q. That was claimed by somebody else?

A. We claim it yet, sir.

Q. It was claimed by somebody, and the Government excepted it from your patent?

A. Yes, sir; there is a little trick there.

Q. It don't matter anything about the trick; we did not have anything to do with that trick; it was not on our side. You objected, didn't you, to Mr. Turck's working in here. When he was going down you stopped his work, didn't you?

A. Where?

Q. When he started to come down.

A. Yes, sir; I wrote him a letter right near that bend.

Q. On the sixth of April?

A. Yes, sir.

Q. Which letter, the one in which you notified him he must quit else you would apply for an injunction?

A. No, sir.

Q. Which letter—the one in which you notified him he must quit, else you would apply for an injunction?

A. No, sir; the court had already ordered it.

Q. You notified him you would have him arrested for contempt?

A. Yes, sir.

Q. And thereupon he stopped work?

A. Yes, sir.

Redirect examination of ERNEST LENEVE FOSTER:

Q. Right from that point, how often did he flood your mine?

A. He flooded our mine for a long time.

Q. Was that notice in reference to the order?

A. No, sir; that notice had nothing to do with the order. It was during the last month Mr. Turck went to work somewhere here in his third level, probably from the Thomas shaft, and was very near breaking through to us, and he was causing the stope to cave. The stope there is about fifteen feet in width, and the northern portion of it is a little lower than the southern portion. It was causing that to cave.

Q. Dangerous work?

A. Yes, sir.

69 Q. Taking this as a definition of a lode—a body of mineral-bearing rock with defined boundaries—can you apply that definition, including the defined boundaries to any one of the ore streaks on which Mr. Turck may have come down?

A. No, sir; to none of the ore streaks found throughout that mine between the porphyry dykes.

Q. You have been questioned considerably about spur, dropper and feeders; I will ask you if that word spur, in particular, is not a relative term?

A. It is a relative term; the conditions vary there as to what you would call a spur and what you do not. Each man will form his own opinion.

Q. A spur long enough—fifteen hundred feet—long enough for an entire location, might itself be a spur to a much larger vein?

A. I suppose it might.

Q. Referring to the Colorado Central, between the limits shown in that model, is there a proof of the spur anywhere coming out or coming in except possibly the break at the part here?

A. I know of no other part.

Q. Do all the so-called spurs, droppers, feeders, stringers, come

from the walls into the lode, or have they gone inside the lode? Do they end when they reach the porphyry wall?

A. All the ore bodies in this lode are found within the porphyry walls; they do not extend outside, whether they come in as small droppers or drop out of the same main ore channels, with the exception of that I have mentioned, and which as yet I am not fully satisfied as to its conditions; the developments are not yet sufficient to make one's mind up completely.

Mr. TELLER: You mean the north porphyry dyke?

A. Yes, sir.

Q. There were exhibited here various specimens claiming that on each different kind of rock that Mr. Turck calls country rock, you could show the actual ore itself; I would ask you if they were isolated specimens or whether they abound through the mine?

A. You will find them all over the mines at different times. In working the mine continuously you find them scattered from one end to the other.

Q. This that was read from that book, is that——

The COURT: Mr. Morrison, your time is up, sir.

And the defendant further to maintain the issues on its part, produced also certain other witnesses of lawful age, to wit: C. E. Dewey, mining engineer; W. H. Wiley, mining engineer; J. M. S. Eagan, mining superintendent; Isaac M. Wallace, foreman of the Colorado Central mine, and Hugh Stewart, Patrick McNulty, and R. E. Nelson, all miners by occupation, of large, practical experience, who testified to facts showing them to be competent
70 to give evidence as experts, who testified and gave evidence substantially the same in all points as the evidence of William Byrd Page, Ernest Le Neve Foster and Albert E. Chase, hereinbefore given in detail, and tending to show that the Colorado Central lode was a lode of great width, to wit, varying in width from fifty to 150 feet, and confined substantially between the two porphyry dykes mentioned in the testimony of the said witnesses given in full; and also that there was an ore measure traced to the slide north of the north side line of the plaintiff in the O'Mally raise and an ore measure carried to the surface north of said line in the Herrick raise; each of those raises connected with the other workings of defendant; and that in said ore channels the veins, if such ore channels were considered as separate veins, such veins were well defined as the ore channel in the plaintiff's main working shaft, and that the ore measure followed in plaintiff's main shaft and the ore measure followed down through the fissure stope, and the Bruce stope into the Peterson stope was only one of several ore measures found within the same large lode, and that the apex of the ore measures found on the north side of the Peterson stope in the O'Mally raise, in the Herrick raise, and in the shaft sunk from the Jim Hall tunnel, were all of them north of the plaintiff's north line, and within the lines claimed by defendant; and also tending to prove that there was no north wall in any of plaintiff's workings, but that the rock treated by plaintiff as the wall, was a slip or

break in the fracture of the formation, and that the same slips which the plaintiff and plaintiff's witnesses called walls were found on both sides of the ore measures disclosed in the O'Mally raise, the Herrick raise, the shaft from the Jim Hall tunnel, and in the other workings of defendant.

All of which evidence was received without objection or exception.

The defendant then offered in evidence the patent of the Colorado Central lode, and the patent of the Colorado Central Extension lode, and the former patent dated ——, —, and made an entry of —— and deeds and conveyances showing chain of title complete in defendant, to the fee-simple title granted by the said patents, vested in the defendant before the beginning of this suit.

The defendant further to maintain the issues on its part produced and offered in evidence the affidavit of William A. Arnold, filed in cause 2320, of said court; of F. A. Maxwell, filed in the same cause; of —— Thompson, filed in cause 2551, between the same parties in the said court. The bill of complaint in said cause numbered 2320, verified by plaintiff and the affidavit of plaintiff in cause No. 2251 in the same court, between the same parties in which the said persons, all of them witnesses in this case on behalf of the plaintiff, had in such affidavits stated that the rock be-
71 tween plaintiff's shaft and the fissure stope and other workings of plaintiff's alleged north vein, to wit, the rock at the tunnel level, and the two cross-cuts below said tunnel level was all country rock.

The defendant further, to maintain the issues on its part, offered in evidence the model and all maps and specimens exhibited on the trial of the case.

And thereupon the defendant rested.

The plaintiff further, to maintain the issues on his part, called in rebuttal other witnesses, to wit: W. C. Minger, Willia/ A. Arnold, superintendent of plaintiff's works; E. E. Chase, mining engineer; Wm. H. Richardson, Hugh Elliott, James Alspaugh, Thomas Cornish, T. E. Shay, Daniel Riley, —— Thompson and Francis T. Freeland, mining engineer, all of whom testified to facts showing them to be persons competent to testify as experts in this case, and testified to facts tending to show that the rock in the various cross-cuts in the workings of plaintiff and defendant was country rock and not crevice material, and that the workings of the defendant described by the witnesses were not all upon one large vein, but upon several and distinct veins, one of which was the vein claimed by plaintiff, and in other respects substantially to the same effect as the witness Frank A. Maxwell, whose testimony is hereinafter given at length.

The plaintiff further to maintain the issues on his part recalled as a witness in rebuttal—

F. A. MAXWELL, who had been duly sworn, and who further testified as follows:

Direct examination by Mr. TELLER:

Q. Have you examined that model?
A. Yes, sir.
Q. Do you wish to say anything about it?
A. I believe it is substantially correct.
Q. Substantially correct as to those things it purports to show—there are some things it does not show, aren't there?
A. Yes, sir.
Q. Have you ever examined the Benny cross-cut?
A. Yes, sir.
Q. You may go on, briefly and rapidly as you can consistently, and state.

Mr. Hughes objects.

Mr. TELLER: I desire to make an examination of the Benny cross-cut as lying within the ground covered by his former testimony.

72 Objected that it was properly part of his testimony-in-chief; he testified all around it; I don't think he said anything about that cross-cut itself.

The COURT: The rule is well settled about that; the plaintiff can go over anything that he has touched upon in his evidence-in-chief, but if you go into openings which he did not examine concerning he has a right to offer testimony in rebuttal in respect to those openings.

To which ruling of the court in overruling said objection defendant's counsel then and there excepted.

Q. State when you made the examination, how often you made it, how thorough it was and what you found.
(Witness refers to note book and says:) Some time previous to the last trial.
Q. The last trial a year ago last November?
A. The 20th day of November the inspection was begun and continued from day to day; November, 1889; I should say I was in the mine at one time previous to that; it was only fifteen feet in length the first time I was ever in the *time*.
Q. When was that?
A. I don't know the date; it was 1887, some time before that; the cross-cut at the time of the last inspection had been continued to a length I believe of ninety-five (95) feet.
Q. You mean previous to the first trial?
A. Previous to the trial November a year ago; it was run along in the right-hand side of the cross-cut, supposing the cross-cut runs from this way south, in the right-hand part of the cross-cut. Near the top in the top of the beginning running toward the breast is a mud slip you might say, something miners shoot to; there is

a small amount of gouge in that slip; no ore, no evidences of ore within twenty feet of the breast; even that plays out entirely. That is run with the cross-cut crosswise of the general strike of the vein. The remainder of the material is the black mica-schist rock testified about here, and is the ordinary country rock of the mountain. A very large part, proportion, is made up of that mica-schist rock.

Mr. HUGHES: You confined it to this working, didn't you?

Mr. TELLER: No; go on.

The WITNESS: At the present time, there is a plug in there, said to be the bottom of a drill-hole through from the third level. The cross-cut had reached possibly the casing of the lode from Mr. Turck's north wall. It is in the black mica-schist country rock. There are evidences in that rock showing it near a vein.

Q. Have you examined it since the last trial?

A. Yes, sir; it is in the same condition it was two years ago.

Q. Has there been any stoping or anything in it since?

A. No, sir; nothing to speak of; no indication of any vein coming into it, except near the north.

73 Q. That is ninety feet?

A. In that neighborhood.

Q. Is that crevice material?

A. No, sir.

Q. How does it compare with the general mass of the country up there, outside.

A. A large proportion of Leavenworth mountain, on which this mine is situated, is of exactly the same material as found throughout the Benny cross-cut; mica-schist, granitic rock.

Q. Have you ever been in the Carpenter cross-cut?

A. Yes, sir; I have been every place in the mine possible to get into.

Q. Come to the Carpenter cross-cut; tell us when you were there the first time and the last time.

A. Some time before the other trial, and this trial.

Q. State what you found.

A. The same class of material, except about the middle of the Carpenter cross-cut there is a small vein called on the model and maps the Stewart drift, running west one hundred and fifty feet to the valley; south drift run west under the Peterson stope, over the top of the Nelson stope.

Q. Can you point that out?

A. This is the Carpenter cross-cut, comes through here, this being the Stewart drift running to this point; then the cross-cut back again to porphyry; left the porphyry at the beginning of the cross-cut; cross-cut to porphyry; cross-cut again through the Wagner cross-cut, I believe it is called, to this vein again and the stopes connected with it.

Q. State what you found in that Carpenter cross-cut.

A. It is mainly the mica-schist rock.

Q. Is it crevice material?

A. No, sir.

Q. Where next did you examine; which will you take next?
A. It does not make much difference.
Q. Take this.
A. This is continued along a small vein; shows a small streak.
Q. You mean what is called the Stewart drift?
A. Yes, sir.
Q. Then what is this cross-cut north?
A. That is through very hard black mica-schist rock, as they come to that level above.
Q. What is that run in—start at the Pollard raise?
A. The Marshall tunnel——

Mr. HUGHES objects and says: The witness testified about that; described that; followed down on the stopes; this is your vein up here; I know he testified about the Marshal tunnel and the five-hundred-foot level.

74 Mr. TELLER: We made no examination of that whatever.

Mr. MORRISON: We naturally expected testimony in rebuttal on new raises; we proved points of connection; we expected it, although we did not anticipate they would be allowed to give testimony in rebuttal on the cross-cuts; we did not expect they would attempt to go into the whole series of levels again or claim they had confined themselves to a point south of their hanging wall, which they did not do at all. This is substantially going over their whole case.

The COURT: I don't think they went into the Marshall tunnel level.

Mr. H. M. TELLER: We were bounded by our north wall.

Mr. WILLARD TELLER: We stuck to the wall.

Mr. HUGHES: You certainly ran into the Harris shaft and the McCloskey level.

To which ruling of the court in overruling said objection, the defendant by its counsel then and there excepted.

Q. Tell us from the Pollard raise what you found, where it makes this turn:
A. It is run through the country rock the greater part of the way, near the breast of the cross-cut, north of which at the breast shows about two feet of vein matter. I think the level is through country rock after it passes that point.
Q. How does it compare with the country rock you found in those cross-cuts?
A. It is not as hard as above the cross-cuts; at least, as that selected from the cross-cuts possibly nearer the surface.
Q. Did you examine the Grant raise?
A. Yes, sir.
Q. State what you found without my asking you questions; I think we will get along faster; I am anxious to get through.
A. We reach the Grant raise by going through the Pollard raise, where there is a ladder-way crossed through the Stewart cross-cut at the top. At the top there is a small streak of quartz showing

there, with black iron stain. That streak has a strike very nearly north and south. I might say, in connection with that (the Herrick raise), also that the smooth slip on which the Herrick raise is made runs parallel with the course of the Colorado Central about north forty degrees east; the streak on which the Grant raise is put up runs very nearly north and south. There is an angle showing in the level at this point of over thirty degrees between those two slips, but it don't show any evidence of there having been worked for ore. In my opinion there is a small vein in the Herrick raise, but the evidence it does not extend is in this very surface opening; conclusive evidence it is not found in the Benny cross-cut. Likely it might be followed ten feet; it might be followed a hundred, possibly. It has no connection with anything else—nothing to warrant anybody to develop it. I am speaking of the Herrick; that is in the Herrick especially. The slip, if continued on its course, would unite with the Herrick some ten feet west of the Herrick raise. I have been through both ends of the Herrick raise—through the rockway and down the manway. About thirty feet through the rockway it is timbered, and I examined that with a pick, but found no evidence of a slip or crevice material, what a miner would call ore down east. To the west you can only see timbers. At the bottom of the Dago raise it is cribbed up; where the drift ran under the raise it is blocked entirely; you cannot examine it in any way. The Grant raise proper——

75

Q. I will take you in the Brown cross-cut. You examined the Brown cross-cut; state what that is run through.

A. Through country rock, except at a point about thirty feet from the north drift, there is a small drift called the Swede drift, one marked on the model one hundred feet in length both sides of the cross-cut, it is evident from the similarity of the material, and I should judge it joined the main level.

Q. What did you call that?

A. That is a small vein there.

Q. What is it, a feeder?

A. I don't think it is sufficiently developed to see; it certainly does not appear anywhere else.

Q. Did you examine the Stewart cross-cut?

A. Yes, sir.

Q. What is that run on?

A. It is run mainly through country rock. There is a few feet from the north side there is about four feet of a porphyry dyke in there; there is also a small porphyry dyke shows in the side of the Swede drift east of the Brown cross-cut.

Mr. Hughes:

Q. Where is that first place, the porphyry dyke?

A. About four feet of porphyry showing in the side of that cross-cut.

Mr. TELLER:

Q. Have you examined the Pollard raise?

A. I could not examine it thoroughly; it is timbered all the way up and down.

Q. Any stoping done in that?

A. Yes, sir.

Q. Where is it stoped?

A. For a considerable distance below, or their stope continues when you get back of the stope.

Q. It is not shown on here.

A. No, sir. How much stoping is done on both sides I can't say.

Q. Have you located that properly on your map where that will come out?

A. Located it accurately.

76 Q. Point it out on that map.

(Witness does so.)

Q. Is it marked?

A. On the Pollard raise there is shown a brown line. It has that much inclination. This is intended for the back stope.

Q. What is that dark line below that?

A. It is the boundary line of the Colorado Central Extension as patented, the ground above it being excluded in favor of the Nolan-Gilmer claim.

Counsel for defendant object to the witness' stating as to the exclusions, for the reason that it is proper to prove it by the patent; but the court overruled said objection, to which ruling of the court in overruling said objection defendant by counsel then and there excepted.

(Witness is handed map and asked:)

Q. Look at that map on the patent and see if that line is drawn correctly according to it.

A. I know it is drawn correctly from the field-notes of the patent, which I have in my office, the same here the portion of the patent colored yellow, the portion excluded uncolored and this portion of the upraise comes north of that.

Q. Goes north of the portion in the patent, and that is correctly pointed out in the patent?

A. Yes, sir.

Q. You may go down to the O'Malley cross-cut.

A. To reach the O'Malley you pass through a mill-hole ninety feet; then through fifty; strike a small vein of ore; it has been worked, as shown on the model, and the pitch is also shown in the cross-section there, running up through the border of that map. The inclination of the vein, of the wall, as worked there at the east end, is very nearly flat. The wall out here lays as flat as my hand (showing). At the west end it is shown like the stope.

Q. Did you take the course of that?

A. Yes, sir. I didn't take it here (showing). I took it from the joint survey.

Q. Do you know whether that is put down correctly or not?

A. I believe it is substantially.

Q. That is the course?

A. Yes, sir. The stope is raised here, a small stope, possibly thirty fathoms entirely.

Mr. HUGHES: How much?

A. Possibly thirty fathoms of ground stoped.

At the back of that stope they had left the streak on which the stope was made. It shows the point about ten feet west of this raise; plainly shows the height.

77 Q. The height to bed rock?

A. If they continued on the same inclination it would reach the surface south of the Colorado Central south line; it would cross it at an angle.

Q. How far would it cross?

A. As it came east it would cross out of their line.

Q. If that was continued on the strike?

A. Yes.

Q. What do you say about the O'Malley cross-cut?

A. I say it is run through country rock; there are plates of mica in there as large as this (showing); masses, bunches of quartz around in the country rock?

Q. What do you call it?

A. It was in general mica schist, different forms of granite through the cross-cut. The Taylor cross-cut is reached going along the south vein from the Harris shaft, going up the mill-hole some sixty feet; runs from the south vein at the O'Malley level through to the stopes made from the north level forty-seven feet of country rock through that cross-cut.

Q. Which cross-cut is that?

A. The Taylor cross-cut.

Q. Have you ever examined the porphyry dyke on the north side?

A. I have been around it.

Q. Have you examined it recently?

A. Yes, sir.

Q. Did you examine the workings on the north side? I am speaking now of the work north of the porphyry dyke?

A. The porphyry is cut through on the Marshall Tunnel level, on the 400-foot level, on the 500-foot level, on the 600-foot level, on the 650-foot level and the 750-foot level. It is shown on all those levels; the thickness of the porphyry is shown from ten to fourteen feet thick.

Q. You think this is accurately shown there?

A. Yes, sir.

Q. Does this show all the work done over here?

A. It shows the levels; it does not show the stopes.

Q. Has there been any considerable stoping?

A. The stopes are started from over the level, raised to thirty feet high. That was the highest one I was in, about thirty feet.

Q. From your examination of this property all through, what do you say about its being one continuous lode across from the south wall to the porphyry dyke on the north, as claimed by the defendant?

A. I believe that there are three main lodes in that block of ground between the two porphyry dykes, and I think the stopes bear out that statement.

Q. Give your reasons?

A. We have one along the north wall; in some places it plays out for a short distance, but in general along the north side.
78 There is another vein eight to ten feet wide on the south, with characteristic crevice matter, decomposed quartz on the south side, the largest vein of the whole.

There is another vein shown by these stopes, a continuous ore body, running from the south to the north, and that is the only one in any of the workings on which they have followed a continuous vein from the north to the south.

Q. This is what you claim to be Mr. Turck's vein, coming right down through there?

A. Yes, sir; I think the point of junction at the third level is near the Benny cross-cut.

Q. You mean between?

A. Mr. Turck's north vein unites with the others both on the strike and the dip; the point of junction with the south and north rising as you go west.

Q. Explain to the jury how that will occur; how it will rise as you go west.

Mr. HUGHES: Which of the three do you mean? If he means the south vein I object to that as being fully testified about; that he has been over it in chief. You mean on the vein lying north of what you call your north——

Mr. TELLER: We have not any north vein; we claim the south; we claim that this comes up here and unites.

Mr. HUGHES: We object to testimony about what is called Turck's north and Turck's south lode; we think he has gone into the reasons for that very fully; we object to his going all over it.

The COURT: I don't think he can go into any matter touching the south vein.

Mr. TELLER: I don't think we described the way they united.

Mr. HUGHES: Mr. Chase exhibited a piece of paper and showed.

Q. I want to ask you; this work north of the porphyry wall, was that work done at the former trial?

A. No, sir; it was done since; there was no work done north of the porphyry wall at the former trial, to the best of my knowledge.

Q. Do you know anything about the porphyry wall?

A. It is the same material it is after you pass the south porphyry dyke.

Q. If they had country rock on that side; you say it is country rock on this side?

A. Exactly; on the Marshall Tunnel level there is a cross-cut just east of the Benny cross-cut, pushed into that material; show the black mica-schist country rock; in my opinion the same as in the south.

79 The point of junction with the north vein on the five-hundred-foot level is near the Hoglund shaft.

Mr. HUGHES: Junction of what?

A. Junction of Turck's vein with a vein on the north prophyry wall; the Hoglund shaft passing through from the five to the six hundred foot level as it goes east; the vein seems to lay flatter at that point; that is at the six-hundred-foot level. Here is the flat mill-hole, practically carried through from the five-hundred to the six-hundred foot level on that streak on the Peterson stope, which would be on the same streak with the Nelson stope; all connected through on this middle drift.

Mr. HUGHES: That was all testified about.

Q. Is there any such break in that stope as is indicated there?

A. There is certainly nothing showing on the level; it is stoped through, broken through, holed through every few feet.

Q. Where these two stopes are represented?

A. No doubt the same.

Objected to, as before that was all testified to.

Mr. TELLER: You say there is a gap there; we say there is not. We say the model is not correct in that particular.

Q. Does the model show any stopes on the Fisher raise?

A. No, sir.

Q. Are there any stopes there?

Objected for the reasons before given, but the court overruled said objection, to which ruling of the court in overruling said objection defendant by counsel then and there excepted.

A. Yes, sir; there is a stope there some twenty feet. The first time I was there that stope was just started; they were taking out and sacking ore at the time.

Q. I think there was some testimony that cross-cut was continued twenty feet beyond the Fisher stope; the model does not show it nor the survey; the Fisher stope is at the extreme breast where it breaks into number one level? That is the fact, is it?

A. Yes, sir.

Cross-examination of Mr. MAXWELL by Mr. HUGHES:

Q. Mr. Maxwell, you say these cross-cuts are run in absolutely barren country rock?

A. Yes, sir; except where they intersect these veins or feeders from them.

Q. Does that differ in any way from what you described, and do

describe in this affidavit of yours, as lode material when you made the affidavit?

A. Let me see the affidavit, please.

Q. The one I showed you the other day; I don't think we have the original; we have a copy.

80 Mr. TELLER: A copy will do.

(Witness reads affidavit.)

Q. We refer to that portion of the affidavit speaking of the width of the lode in the Aliunde tunnel.

Q. If you cannot turn to it, I will ask you a question that will enable you to state.

A. The Edwards cross-cut; some run through country rock.

Q. I am not asking about the Edwards; I am asking about the first, second and third levels from the main shaft and other cross-cuts. Well, if you can't find it, I will ask you a question; do you know whether the nature of this stuff you call country rock in these cross-cuts differs in any way from the same material in the cross-cuts run from the engine shaft which you swore was a conglomeration of lode material or something of that sort?

A. I don't think I ever called it a conglomeration of lode material.

Q. State whether there is any difference between that rock and the rock you found in those cross-cuts.

A. Well there is some difference in it.

Q. What is that difference?

A. There is not as much banded, shows the banded structure, in these cross-cuts as there is lower down; the lower you get the harder it is apparently.

Q. The Carpenter cross-cut is higher than some you have described?

A. No, sir; all of them below.

Q. That material is harder than the cross-cut you described in your affidavit?

A. I believe if they are so that that material between the north and the south is not vein matter; was never fully persuaded it was. The wording of that affidavit does not exactly express my meaning.

Q. I wanted to know what difference there was between that material described in it and the material you are now describing?

A. They are very much the same general character.

Q. You say except where veins and fissures are introduced?

A. Yes, sir.

Q. In the Benny cross-cut did you intersect a vein?

A. No, sir.

Q. Did you intersect a feeder?

A. There is a mud-slip or foot streak running off through that cross-cut; might possibly be a feeder.

Q. That is to say, the cross-cut follows it?

A. Yes.

Q. What was there in it to follow?

A. There is absolutely nothing except, as I say, about two inches of a mud streak there, which made good ground to break to.

81 Q. How does that mud streak differ from the selvage?

A. It is very much the same material; it has been filtered in from the surrounding rocks.

Q. I wish you would look at this piece of rock and state whether or not that is the character of rock you found in the Benny cross-cut.

A. I could tell you if it were broken fresh. I think there is very little of that rock in the Benny cross-cut.

Q. Is there any of it?

A. Possibly some of this hard material, but very little; the great bulk of it is in this mica schist.

Q. How much would you see in one piece?

A. There has been an inch or two in place rock similar. The rock is muddy. Can't tell without a fresh break on it. That I took from the Benny cross-cut with a pick.

Q. Do you find anything like that streak in the rock in the Benny?

A. No, sir.

Q. Evidences of mineral, ain't there?

A. Evidence of mineral on the face, running along the side; it is not through it.

Q. It is not intermingled with it in any way?

A. No fissures in there; it is not intermingled with it in any shape.

Q. Is there much of that little fissuring through that cross-cut?

A. No, sir.

Q. I wish you would look at these smaller pieces and see if you found anything of that character in the Benny?

A. No, sir; I didn't see anything of that sort.

Q. Would you say nothing of that sort was there?

A. I would say I saw nothing of that kind after a careful examination.

Q. Was your examination so careful you could not say?

A. Not absolutely. I went through the cross-cut about breast-high. I took a pick and broke a fresh surface the whole length of it, the width in some places of six inches, in some places two or three. It was broken continuously for ninety-five feet.

Q. You just took a pick-hammer and knocked off the corners—stripped off the surface along so you could accurately determine the character of the material? You found nothing of the character I have exhibited?

A. Nothing whatever.

Q. At what point was it, what distance in, you found anything like a streak or vein in the Benny cross-cut?

A. Only one showing in the Benny cross-cut, fifteen feet from the north end; that is the only point in the cross-cut where I first saw it, as I remember.

82 Q. Do you call that vein?

A. There is a small gouge streak.

—. Do you call it a vein?

A. From its connection I would call it a feeder of the main vein.

Q. Did it have walls?

A. Nothing well defined.

Q. Would you say it had walls?

A. You can't say whether it has a wall of its own from the amount of development done upon it.

Q. It was too small to tell whether a vein or not?

A. It just shows in the cross-cut running up and down the sides of the cross-cut.

Q. That is all you saw in the character of a feeder, vein or other?

A. Except this flat streak.

Q. There were two, one going vertically and one going through like that?

A. Yes, sir.

Q. Not developed on either side so as to determine their size and extent?

A. No, sir.

Q. Would you call that folding the vein?

A. No, sir.

Q. What would you call it?

A. Feeder or mud-slip.

Q. Mud-slip going flat was it?

A. Yes, sir; practically flat, a slight inclination dipping down northeast.

Q. What was this clay or mud in it, what is called clay or gouge?

A. Yes, sir.

Q. Did it have walls?

A. There might be smooth places, mica.

Q. Would you claim it did have walls of other material?

A. Country rock on both sides.

Q. Are those the only indications of mineral or streaks you found in that cross-cut?

A. They are the only indications, except as I say at the breast it shows evidences of approaching a lode.

Q. What are those evidences?

A. The rock begins to be with small slips in it; after it stands a while it would slack, come down.

Q. Any mineralization in it?

A. No, sir.

Q. That is a crack in the rock?

A. It is a crack in the rock.

Q. That is indicative of the approach of a lode?

A. That is indicative of the approach of a lode.

83 Q. Now, in the Carpenter cross-cut you found the same kind of rock as in the Benny incline?

A. Yes, sir.

Q. And substantially the same as you found in these levels run from the main shaft up here?

A. They are all granite rocks, they shade from one into another;

you can't tell you will find one thing in one and another in another, but still of a certain general character.

Q. I wish you would look at this vein material, Mr. Maxwell; tell me if you found anything of that kind in that Carpenter cross-cut.

A. I don't remember of anything of that kind, although the gouge material looks very much like the Swede drift or Stewart drift.

Q. What would you call this piece I have in my hand?

A. I would call the center of it vein matter.

Q. What do you call the sides?

A. Shading into the country rock; there is the gangue of the vein on that side.

Q. That is vein filling, isn't it?

A. Yes, sir; that is generally found very close to a vein, as a rule.

Q. Would you call that part in there vein?

A. Yes, sir.

Q. And all this I have is vein matter?

A. I ain't sure about this—largely feldspar, line of cleavage between the mineral.

Q. Do you call that a line of cleavage?

A. These specimens are dry and dusty; I can't tell without it is broken fresh.

Q. You can't see anything you would call a wall?

A. No, sir.

Q. You do see mineral, gangue, crevice material?

A. Yes, sir.

Q. How much of it did you see in the Carpenter cross-cut; where did you see material resembling that?

A. It is found in the Stewart cross-cut, in the Carpenter cross-cut from a few inches up to two feet.

Q. Anywhere else; did you find any in the middle?

A. The Stewart drift is nearly the middle of that cross-cut.

Q. Did you find any about the middle distance between the Stewart drift and the end of the cross-cut?

A. No, sir.

Q. Did you examine?

A. Yes, sir.

Q. Carefully enough to satisfy you as before?

A. I didn't examine both sides and all over; I went along through the side and broke off; found none of that material whatever.

84 Q. How much time did you spend there, Mr. Maxwell, in the examination of this cross-cut?

A. It is difficult to say what time I spent in any one place. I can't tell you the time I spent in the mine.

Q. I want to know this cross-cut.

A. I examined that carefully as other portions.

Q. You went through another cross-cut—the Taylor; what did you find in that?

A. Forty-seven feet of very hard country rock.

Q. Anything else in it?

A. I don't remember anything else there.

Q. How carefully did you examine that?

A. The same way as the others.

Q. Did you find any such material as these pieces I hand you anywhere in it?

A. I don't remember any material like that. Of course there are portions of these specimens you find rocks there very much like; I don't remember anything exactly like it.

Q. Would you say there was such material?

A. You can pick up as small a specimen as that; it is impossible that you can't find it in forty-seven feet; I would say there is no great amount of this material there.

Q. And that the body of it is the same as the Carpenter and these other cross-cuts you mentioned?

A. There is less mica schist in that cross-cut than in some of the others I have mentioned. The granite is very hard; you break off a piece and strike it with a hammer and it will ring.

Q. Look at this box and tell us whether or not throughout the length of that cross-cut material contained in these boxes is not to be found.

A. Material like that on the outside of that running through?

Q. Is not there the material on the inside?

A. Possibly, once in a while a little, if you take that stuff near the north vein and south vein, there is considerable of this gangue.

Q. Say at twenty-two feet in; do you find anything of that sort on the north side of the drift?

A. No, sir; I don't remember any such thing.

Q. You would not say any such material was not found along there, just as shown by this box?

A. I would say I didn't find any of it there, after careful examination. I was looking to find out everything I possibly could regarding both mines.

Q. You examined the north side?

A. I forget which side of the cross-cut it was I did examine. I walked through it; considerable of that material.

Q. What do you call that?

A. Granite.

Q. That is marked No. 7. Does it differ in any way from the rock found—I mean right in it?

85 A. I don't think ore is ever mixed with that kind of rock.

Q. State what other cross-section you examined?

A. I have been into all of them that are accessible.

Q. I mean that you described now?

A. The Brown, I guess, is the one specially I was asked about on the same level as the Benny, a little further west.

Q. What kind of stuff do you say is in the Brown cross-cut?

A. I say it is country rock.

Q. Any vein, mineral or ore?

A. At about thirty feet from the north there is a small vein.

Q. Of what?

A. It shows a gouge streak quartz, some places a little ore; probably been worked to its limit going west.

Q. You would not hesitate to call it a vein?

A. No, sir; it has been stoped on.

Q. How extensively?

A. I think the stope was possibly twenty feet high, possibly a little higher.

Q. Any difference between the rock in the breast and ends of the stope from the rock on the sides of the stope?

A. As far as the streak is concerned, there is; the streak is composed of very much colored material as this; as you go west it very nearly plays out—runs out to the thickness of a pencil probably.

Q. I wish you would look and see if about five feet in you found any of that kind of rock with mineral in rock very similar in appearance to that. What do you call that rock (handed witness)?

A. I think that is mainly feldspathic rock.

Q. Is not that good crevice material, just as much as this on top?

A. Not necessarily.

Q. Is it as a fact?

A. It depends on the connection where you find it.

Q. Found there, would you call it crevice material or not?

A. You can't; that presence of a small piece of ore would not determine to me it was crevice material.

Q. What do you call the rock found in this cross-cut?

A. You might find it in either place like that.

Q. Would you call it crevice material or wall rock?

A. It would depend on where I found it.

Q. Is would depend not upon the character of the rock, but upon its location?

A. To some extent.

Q. In rock of that character of course that little piece would not make any difference; did you find any ore in the Grant raise?

A. No, sir; as I stated, there is a small streak of dark-stained quartz at the top.

Q. I wish you would look at these pieces and say whether or not they contain ore?

86 A. That one does; that one may have a very small proportion in it.

Q. What is that black stuff?

A. That is not ore; it is quartz with an iron stain; that is, a portion along the slip may be a small amount of ore in it; nothing to be worked for ore; a few particles in it.

Q. Little seams, but not worked for ore?

A. There is a small streak of ore.

Q. Did you find anything like that in the Grant raise?

A. No, sir; no evidence of it.

Q. All you saw was top and bottom?

A. I saw through the timbers, thirty feet from the top.

Q. What width?

A. About a foot.
Q. On which side?
A. On the east end.
Q. You examined in there?
A. Yes, sir.
Q. Did you take out any pieces?
A. Yes, sir.
Q. Bring any of them here?
A. No, sir.
Q. You say you went into the Herrick raise?
A. Yes, sir.
Q. What did you find there?
A. There is a small vein there.
Q. That is a vein, is it?
A. Yes, sir; a local vein there has never been developed to see whether it extends. Perhaps I can illustrate what I mean by that vein in this way: In that country there have been a great number of long cross-cutting tunnels run——
Q. I didn't ask you about that.
A. You don't find veins, cut gash veins.
Q. What do you say this is in the Herrick raise?
A. I say it is simply a local vein which cannot extend, and which certainly does not extend to any great depth, because it would be shown in the Benny cross-cut; it comes up to bed rock practically.
Q. You are satisfied it is at bed rock?
A. Practically, yes.
Q. How deep do you know it to go down?
A. To the bottom of the Herrick raise, about forty-five feet.
Q. You don't know where it goes after that?
A. No, sir; it is not developed after that.
Q. You claimed that your examination made as you have described in the Grant raise shows that it does not go down the Grant raise?

87 A. Yes, sir. The streak in the Herrick raise and the streak in the Grant raise, the slips where the two join at an angle of over thirty degrees, and the slip——

Q. That proves that they are not on the same vein?
A. It proves that they are not on the same; not absolutely.
Q. What does it prove, if it proves anything?
A. It shows they are not connected.
Q. Do you say they are or are not on the same vein?
A. I believe they are not. I don't believe there is any vein in the Grant raise at all.
Q. You say you went up the O'Malley?
A. Yes, sir.
Q. How high did you go?
A. I went to the top of it.
Q. What is it in?
A. The top shows the gravel.
Q. It is past the bed rock?
A. Yes, sir.

Q. Up into the wash, any water coming through?
A. Yes, sir.
Q. Any considerable quantity?
A. Yes, sir.
Q. You were right at the top?
A. Yes, sir.
Q. As far as it goes?
A. Yes, sir.
Q. Did you see any ore up in there?
A. Not one particle.
Q. Did you see any vein?
A. No, sir.
Q. What did you see?
A. I saw the granite rock and water.
Q. Nothing else?
A. And boulders.
Q. No crevice material?
A. No crevice material, whatever, of any kind; I went across that with a pick; the west end of it is practically dry; a candle will stand on the wall and burn.
Q. How far is that from the east end?
A. About eight or ten feet. This is really ten feet, ten feet in length, four or five feet wide.
Q. Did you see any such material as this (handed to witness); if so, what do you call that material?
A. That is a black-stained quartz, which you meet anywhere on the surface.
Q. Is that vein material; is there any ore in it?
A. Very small ore, if any.
Q. Some?
A. There are specks in there.
Q. Any streaks?
88 A. I don't see any.
Q. You don't?
A. No, sir; from the specimen I say it is the rock that has been testified to by witnesses; you will find that O'Malley raise is very nearly under the creek, and there is a large amount of water there; and you will find anywhere near the surface of the ground, where there is plenty of water, you will find that iron stain extending some distance into the bed rock.
Q. You say right here you made a survey of the bottom of that stope?
A. Yes, sir; that was surveyed at the former trial.
Q. Does not the stope change its dip; I want to understand if you mean to say that you saw enough to swear that it does not change its course exactly as that raise does, and go up in the same direction?
A. I can say I don't believe the mineral streak on which that raise is made.
Q. Does not the stope?
A. No, sir.

Q. You made sufficient examination to swear to that?

A. I examined both ends of the stope.

Q. Is there any difference in the top?

A. Yes, sir; very much.

Q. What is the difference in the dip of the stope at the east end and west end; how many degrees?

A. Along in the back at the end of the stope at the east end it dips twenty-six degrees from the horizontal; at the west end it dips fifty degrees from the horizontal; in the middle it dips six inches to the foot.

Q. Give it to us in degrees.

A. I have not the degrees.

Q. There is more difference between the ends than there is in the bottom and top, as shown on this model, ain't there?

A. Possibly, yes; I don't remember that that has been practically completed to its limit in the drift.

Q. You think it has?

A. I think so as far as stoping or anything in the drift or indications of ore; so far as evidence in stoping is concerned, the stope quits.

Q. Frequently goes on absolutely barren for hundreds of feet?

A. Yes, in this very ground that has been the case; it is not connected with any other workings, it is simply local there by itself.

Q. Purely local; you can say that, can you?

A. I think so; as far as any developments go, it is certainly the case.

Q. You examined, as I understand, the Cornish cross-cut, too?

A. Yes, sir.

Q. Is there any lode going through that?

A. I remember the Cornish cross-cut, it is the one the track
89 goes through on the six-hundred-foot level; I think there is a vein there about twelve feet from the south end.

Q. What size?

A. There is a stope carried up on it for some distance.

Q. Well, give us any idea of the width of it.

A. It is a stope four or five feet wide, an ordinary stope for convenient working, probably stoped the full size of the vein, if not larger.

Q. No question about that being a vein in your mind?

A. No, sir; clearly defined.

Q. Has it got a wall?

A. In fact very well defined.

Q. How many different veins did you find in these various cross-cuts you testified about, Mr. Maxwell?

A. I believe there are three main veins shown and there are other local veins which do not show, except on one level.

Q. I mean counting what you found in these cross-cuts, these various cross-cuts you have sworn about this morning, which you did not testify about in chief.

A. The vein which shows in one cross-cut is not shown in another one. You take any one horizontal section I can tell you.

Q. Take your different cross-cuts, can you say how many distinct ones, or have you any idea?

A. I think there are three main veins and there are several feeders running through along there will show in one cross-cut and another in another.

Q. And then play out?

A. They certainly have not been developed.

Q. Would you undertake to say they don't exist and don't run through?

A. If they do they are very small.

Q. Nothing remarkable in the fact they are small?

A. In the neighborhood of any large vein there are stringers and feeders going off in various directions.

Q. I will ask you whether it is any evidence being small at one place that is not large at others.

A. They are generally larger as they leave the lode and play out as they go away from it.

Q. You spoke of something found in what was called the Swede drift; what did you say about that, Mr. Maxwell?

A. I say there is a small vein there.

Q. Is it a vein?

A. Apparently been worked out to its western limit.

Q. Been stoped upon?

A. Yes, sir.

Q. Is not there ore found in it now?

A. I never saw it.

90 Q. Did you examine it closely?

A. I will say I was not in the back of the stope at this examination.

Q. You speak from recollection—a year and a half?

A. It shows work; Mr. Chase stated to us no work.

Q. Didn't you look and see?

A. I didn't go into that stope.

Q. Did not go in?

A. Did not climb up in the stope.

And thereupon the court, of its own motion and at the request of the plaintiff, charged and instructed the jury as follows, that is to say:

In the Circuit Court of the United States for the District of Colorado.

JOHN TURCK, Plaintiff,
vs.
THE COLORADO CENTRAL MINING COMPANY, Defendant. } No. 1862.

Oral Charge to Jury.

HALLETT, *J.*:

(To counsel.) I have not written the charge to the jury, and if I shall omit anything or misstate the law or the facts I wish to be

corrected by counsel. It is expected that counsel will offer their criticisms now rather than hereafter.

(To the jury.) We have proceeded in the trial of this case, gentlemen, with care and deliberation, as was necessary in a controversy of this importance, and you are now to determine the facts upon the evidence, with reference to the law, as it shall be given you by the court. In my comments I may make upon the testimony, it is not intended to influence your judgment in any way whatever. That is to say, if I shall express an opinion upon any matter of fact you are not to be governed by that opinion. My authority relates only to the law of the case. That I am authorized to pronounce. As to the facts, you are the absolute judges.

The statute under which the rights of these parties is to be determined is as follows: Section 2322 of the Revised Statutes:

"The locators of all mining locations heretofore made, or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the 10th day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with State, territorial and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins,
lodes and ledges throughout their entire depth, the top or
91 apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical plains drawn downward, as above described, through the end lines of their locations, so continued in their own direction that such claims will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another."

There is a clause of section 2320 which refers also to the extent of a location, which I will read.

"No claim shall extend more than 300 feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than 25 feet on each side of the middle of the vein at the surface, except where adverse rights existing on the 10th day of May, eighteen hundred and seventy-two, render such limitation necessary."

This statute is understood to require that locations of mining claims shall be along the course of the lode. In other words along the strike, being the course of the lode at the surface or at the point where it approaches nearest to the surface, and following the direction which the lode takes longitudinally; the location is to be made as far as possible on each side of the vein; and it is held if the

miner makes a mistake in respect to the course of the lode, and so locates his claim that it does not follow the course, following the outcrop of the top or the apex at the point where it comes to the surface, or at the point where it is nearest to the surface, that he can hold no more than is embraced within his lines. In other words, if the lode departs from the course of the location and comes into other territory adjoining the location, he acquires no right by virtue of his location to the part which lies outside. And again, in so far as the lode is within the location by its top and apex, he has the right to follow it to any depth to which it may go, although it may enter the land adjoining. The language of the statute upon that subject, which I read to you, is: "Of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines, extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside of the vertical side lines of such surface locations."

So, that having the top or apex within a location, the miner may follow it to any depth to which he can trace it, although it may go into the adjoining territory and to any distance in one direc-
92 tion or the other on either side of his location. In order to the enjoyment of this right it is held in this district that the miner must have within the location the entire top; that is to say, the lode must be within his lines, whether it be of one length or another, it must embrace the whole top or apex; and if in any case the lode is wider than the location, so that his location is not wide enough to cover it, or if he passes out on its strike, so that a part of the top or apex lies without and a part within, then his right to follow the lode into adjoining territory ceases as to such parts.

The controversy which has arisen between the parties and which has been so fully explained to you through all the days in which you have been sitting here in this, that the plaintiff claims that in his location, which he calls the Aliunde, No. 2, he has the top and apex of a lode entirely within his ground. He claims that he has it for about 600 feet from the west end of the Colorado Central location, and that in virtue of having the top and apex within his location, he has a right to follow it down into and under the Colorado location, and under some other locations which lie north of that, to any depth to which it may go. The defendant's position is that the vein at this point and at all points where it is claimed by the plaintiff, is of a much greater width than stated by plaintiff; that the top or apex there is so wide that it extends over into the territory of the Colorado Central location, and perhaps beyond that to the northward and into other locations which lie on the north side of that; so that the line, which divides the Colorado Central from the Aliunde, No. 2, bisects the top and apex, and therefore the plaintiff can have no right beyond the side line of his own location extended downward vertically; and this is the matter for your consideration; upon that, the question is whether the lode is of the width claimed, or at least that portion claimed by the plaintiff is of the width stated by him, and whether he has the top and apex of

it, or whether it is of the greater width claimed by defendant. In reaching a conclusion upon that point it is necessary to consider somewhat the nature and character of a lode or vein. A typical lode or vein, one which fills the exact definition given in the books, is a fissure in the crust of the earth filled with mineralized matter. The vein matter with which a fissure is filled may be of value or it may not be; that is to say, it may constitute a mine which will be worked for the valuable metals in it, or it may be barren. Whatever its value, the matter which is in the fissure is foreign to the inclosing rocks. It is of different origin. It is subsequent in its growth and development to the formation of the fissure. And in this character of vein or lode of which I am speaking, that which fulfills the exact idea expressed in the books of such a thing, the crevice is easily distinguishable from the inclosing rocks; the walls of the fissure, or boundaries of the opening, constitute the walls of the lode or vein within this definition; and in any case of
93 that kind, where the crevice matter, the filling of the vein or lode, is so far different from the inclosing rocks that you may say that it is something quite foreign to them; that it has different elements; that it is marked by a different appearance. There can be no difficulty in determining the boundaries of a lode.

Sometimes, however, it happens that what may be called a vein is only a mere seam or opening in the rocks, and that the walls themselves are mineralized to some extent, and the mineralization which has taken place in the walls fades out as you go from the fissure. Whatever the force or agency which caused the mineralization in the fissure, it only had effect within certain limits upon the walls of the lode. This is illustrated in what are called contact veins, where the mineralization has taken place between rocks of different classes along the line of contact, and in such instances the mineralization of one of the rocks along the plane of junction has been greater than the other; so that it is possible to say in such case that there is a vein, which may be traced by the value of the ore in the walls, and which in itself has no walls which are distinctly traceable; still there is the plane of junction between the rocks which form the line of progress of the mineralizing force, whatever it may have been which made the lode.

We need not, however, dwell very much upon such cases as that, and we need not refer to the case of an exact fissure which with distinct walls of rock has crevice matter between, and is easily distinguishable from the country rock on each side, because in this case the claim of defendant is that the country itself, for a considerable breadth along the line between the adjacent claims, was mineralized to such an extent that the mineral is found in all places throughout the zone, without reference to any law of occurrence in any particular part of it. That makes a case very different from that to which I asked your attention. It is said that the country itself, the granite rock which constitutes the mass of the mountain, is mineralized throughout a certain zone, and that

the rock itself does not carry the mineral, the valuable metal in its texture.

It would seem to be a matter of no great difficulty to determine the fact.

Referring again to what was said about a typical vein or lode, one which occurs in a rent or fissure of the earth, caused by some upheaval, as we may assume, and afterwards filled with valuable matter, it is clear from observation and from experience in all parts of the world that there may be several of these in the same neighborhood. The force which is sufficient to cause one fracture we may readily assume will be sufficient to cause several, and the agency which may mineralize one of the crevices which may be made in this way, may fill several of them. And
94 so it may happen in any case that there may be several lodes within a short distance of each other. They may be so connected as to be regarded, perhaps, as but one with several branches, and they may be so distinct, having no connection whatever, as to make it impossible to say that they are one.

On the other hand, it may be possible that in some instances a zone or belt of country may be so broken up that the whole of it for a distance of greater or less width may be brecciated—that is, broken into fine parts—and mineralized, so that the entire zone shall be regarded as but one lode.

Now, the question which is presented by the evidence here is, whether in this belt or zone of country, which the witnesses have described before you so fully and at such length, the condition of things exhibited to you by the testimony and by these maps and models is of one kind or the other; whether in this belt of country which the witnesses have described there are several lodes or veins, or whether it shall all be taken to be one.

Counsel for defendant insist that between the porphyry walls which extend throughout this territory, or which it may be fair to assume extend throughout the territory in greater or less strength, the condition is that the whole country is broken up; the entire space between the two walls is broken up to such an extent, and so far mineralized, that it shall be taken to be one lode only. The position of the plaintiff is that in this same space there are several lodes or fissures which should be separately regarded, and should be taken to be separate or distinct lodes or veins.

There is some difficulty undoubtedly in accepting the defendant's theory in consequence of the development of a body of mineral upon the north side of the north wall of porphyry, because you cannot well say if there be something to the north side there of value, another body of ore, which so far as developed is quite as distinct and full in every measure as that upon the south side; you cannot well say that his north wall or zone, or belt of porphyry, is a wall of a lode; and if you do not accept that as a wall, then where shall the wall be fixed on the north side of that? where shall we say that it is?

But I do not want to enter into the discussion of the testimony. The counsel have done that; and I do not even wish to express an

opinion to you upon it. I wish to bring before your minds clearly the question whether this region in which the several bodies of ore are found was so broken up; by whatever force caused the openings which undoubtedly exist in those rocks was broken up, and afterwards mineralized by the agencies which were at work there, as to constitute one vein or lode, or whether the rents and fissures which it is said have been followed in the various workings, the stopes, levels and drifts; whether they are of a separate and distinct
95 character. That is clearly a question for a jury, and, as it seems to me, upon its determination your finding should be made almost entirely. That is the principal question for your consideration, although, as I shall presently mention, there may be something more.

As connected with that question, maintaining as defendant does the proposition in all its testimony and in argument, that the whole space comprehended in all the workings is to be taken as only one lode, it nevertheless seeks to maintain before you that if plaintiff's views be accepted by you, and that defendant has what may be regarded as a north vein coming to the surface somewhere near the north side line of the Colorado Central location, or north of that, it may claim all below the point of union between the veins under such an outcrop as that. I do not think that can be a question for your consideration. The defendant, making the issue that the lode is one—that the entire space covered by the workings is but one lode; that a broad outcrop, top or apex extends from somewhere in the Aliunde, No. 2, ground northward, through and across the Colorado Central ground—is not at liberty to change the issue by saying that there are several veins, and asking you to find on that hypothesis that there is an outcrop under which it may claim from the junction of the two and below that.

But if that were not true, there is no evidence before the jury upon which we can locate that outcrop to any considerable extent. That is to say, if there is any outcrop, top or apex shown in the Herrick raise, and in the O'Mally raise, and in the shaft which comes down from the Jim Hall tunnel, we are unable to say whether that falls within the Colorado Central location to any considerable extent; the Aliunde patent is senior to the Colorado Central Extension patent and to the other patent which was mentioned as belonging to the Nolan and Gilmer parties, or at least it is senior so far as the issues in this case are concerned. If defendant, relying upon that, intended to put itself upon the ground that there are several veins in this territory and that it is entitled to hold the northeast one, and all below the point of junction under its location, it would be incumbent upon it to show the location of the top and apex throughout the territory in controversy, so that it may be seen whether it is senior or junior to the plaintiff's patent.

Something was said by one of the witnesses, Mr. Freeland, I think, as to the part of the outcrop upon the Aliunde Tunnel location, No. 2, being higher than any other part of the outcrop within the other locations, if you take the lode to be of the width claimed by defendant; and I am asked to say to you that that is not a question for

your consideration; and that I state to be the fact. That proposition is correctly stated by defendant. You cannot consider whether one part of the outcrop be higher than another if the lode is
96 of the width claimed by defendants extending across from the Aliunde Tunnel location to the Colorado Central and beyond that.

I am also asked to state to you what was said by plaintiff's counsel about the Nolan and Gilmer controversy is not for your consideration; and I state also that we have nothing to do with the Nolan and Gilmer controversy in this suit, except in connection with the question of the top and outcrop of the lode, and the extent to which, if any, it departs from the Colorado Central location.

I do not know that I heard all that was said by counsel upon that subject, but in the way in which the case is put before you, substantially to inquire whether the lode is of the width claimed by defendant; whether all the workings exhibited before you are upon one and the same lode, or upon several lodes, it is scarcely possible that any question concerning the Nolan and Gilmer controversy can be of any weight in your deliberations.

And now with reference to the territory claimed by plaintiff, of course it is only in so far as he holds the top and outcrop of the lode, or of that which he claims as exhibited in his own works and extended down from the Aliunde workings to the lowest levels. You must be of that opinion in order to find for him that he has this top and apex distinctly in his territory and the extent of it towards the eastward is a question for your consideration. Formerly it was made quite a point, the place where it comes into the location of the Aliunde, No. 2; that is to say, the witnesses were given their opinion making some estimates and calculations as to the exact place in which it came. In this trial we have not had anything of that; the extent to which the plaintiff claims is I believe 600 feet from the west end of the Colorado Central location; going eastward along the line of the two locations 600 feet, which is not far from the Johnson upraise—perhaps a little east of that upraise.

That is correct?

Mr. Teller: East, your honor.

The Court: I do not see that the parties have drawn this question much in issue in this trial, and apparently they submit that you shall determine the case upon the point which they have contested whether this which the plaintiff has in his territory is the top and apex of a distinct lode or only part of the general top and apex of a broad lode extended far beyond that to the north. I am asked to say to you, also, gentlemen, that upon these questions the extent to which the plaintiff has the top and apex, and upon the point that what he claims is a distinct and separate lode from the other, the burden of proof is upon him. That is to say, the fact must appear to you to be clearly established by the weight of the testimony; the testimony must preponderate upon that side; and it is
97 true that if upon consideration of all that has been stated before you, you are in doubt upon that proposition, if your minds are evenly balanced between the plaintiff and defendant,

then you are to find for the defendant; but if the evidence preponderates in plaintiff's favor upon these propositions you are at liberty to find for him according to the allegation of his complaint.

And as to what was alleged about the difficulty of giving plaintiff possession, it being conceded by him that there are several veins in this ground, and that they unite at a considerable depth where the parties are likely to come in collision—this is a case, in which if the parties are to go on together in this ground, undoubtedly as to the points of junction, where conflicts are likely to arise, the court will be under the necessity of keeping control of them. That is not altogether a new matter with us. We have had large experience in carrying on mines through the instrumentality of the parties, and holding them apart in places where they show a disposition to fight; so that if your judgment is for the plaintiff upon all the evidence, we shall have no difficulty in respect to the management of the property and in respect to fixing the lines upon which they shall proceed in their management.

Of course, if you find for defendant, then the line of demarkation between the parties is the north, certainly should have intended south, line of the Colorado Central location carried downward vertically.

Mr. TELLER: I have no criticism except I think perhaps your honor saying we claim west of the Colorado Central might mislead the jury; it should be probably southwest. We lay claim in southwesterly course, you can see hardly——

The COURT: I may have used the points of the compass a little inaccurately, gentlemen, but I think you will understand all that I said about it. These directions are not exactly according to the cardinal points anywhere, not exactly north and south and east and west, because the locations run northeast and southwest; and so, if we were to be accurate in these matters, we would have to use some directions between the cardinal points; but you know what direction I mean when I say north and south and east and west.

Mr. MORRISON: If the court please, we desire to reserve several exceptions.

In regard to that part of the charge that says that the defendant is not at liberty to change the issues and prove his separate apex.

In regard to the charge that there is no evidence to locate that outcrop except at particular points, because there is an apex on both sides.

98 The COURT: No evidence to locate it with reference to the lines of the different locations.

That is what I wish — state, if your evidence will show that the lode has an outcrop somewhere within the lines of the Colorado Central location, we cannot trace the extent of it within that location; we don't know where it would come into the Colorado Central Extension, and we don't know where it would come into the other patent which is in the little wedge that comes down there.

Mr. MORRISON: That is true, the outcrop throughout the whole case on both sides is only proved in spots on account of the wash.

The COURT: Yes sir.

Mr. MORRISON: In regard also to the burden of proof as to that issue.

In regard also to the refusal of the court to give our instructions numbered 1, 2 and 3, and so on, consecutively on points of law.

The COURT: That is as to the Colorado Central location upon the dip.

Mr. MORRISON: Yes, sir; there are one or two; in those three we raise clear points of law. We wish a ruling on them.

The COURT: I decline to give these instructions.

Mr. MORRISON: All that I am getting at is to take the proper formal exceptions on the record. I will ask if I did not specify to except to the refusal to give those specific instructions?

The COURT: I understand it as you do. I decline to give those instructions. Your exception covers the whole matter.

To the giving of which said instructions to the jury, and *and* each and every of them, the defendant by its counsel then and there duly excepted.

And afterwards and on, to wit, the — day of May, A. D. 1891, said jury was recalled and further instructed by the court in substance as follows: That is to say, the jury asked of the court whether or not, if they were satisfied from the evidence that there was an apex of a lode disclosed in the Herrick raise, whether the proof of such lode in such raise would justify a finding for the defendant; to which interrogatory of the jury the court answered that such fact could not avail to the defendant as proof of an apex within the meaning of the law, unless the jury should be of the opinion that the lode is of the width claimed by defendant. Evidence of such apex is of no weight except as affecting the width of the lode at the surface. If the jury should believe the lode to be as claimed
99 by defendant, and this to be a part of the general outcrop, it might be sufficient to sustain defendant's view of the case.

To the giving of which said instruction said defendant specially objects and excepts, for the reason that the same was given without counsel for defendant being present, as well as for the reason that the said instruction was contrary to law.

And afterwards and on, to wit, the 16th of September, A. D. 1891, came the said defendant by its attorneys aforesaid and filed in said court and in said cause its assignment of errors.

And said assignment of errors is in words and figures as follows, to wit:

Assignment of Errors.

UNITED STATES OF AMERICA, }
District of Colorado, } ss:

In the Circuit Court of the United States for the District of Colorado.

JOHN TURCK, Plaintiff,
vs.
THE COLORADO CENTRAL CONSOLIDATED MINING COMPANY, Defendant.
} Assignment of Errors.

Now comes said defendant, by Morrison & Fillius and Charles J. Hughes, Jr., its attorneys and says:

That there is manifest error in the record and proceedings of the court herein in this, to wit:

1. The court erred in charging the jury after their first retirement in the absence of counsel for defendant.

2. The court "erred in charging in such additional instruction that if there was an apex found in the Herrick raise it could not avail to the defendant as an apex within the meaning of the law."

3. The court erred in refusing to give defendant's instruction No. 1, to wit:

The court instructs the jury that the plaintiff, John Turck, as the proprietor of the Aliunde Tunnel, No. 2 lode, holding a patent therefor, based on a discovery made after the final patenting of the Colorado Central lode, has no right, as such proprietor, to recover his lode underneath the Colorado Central lines.

4. The court erred in refusing to give defendant's instruction No. 2, to wit:

100 "The court instructs the jury that the plaintiff, John Turck, as the proprietor of the Aliunde Tunnel, No. 2 lode, holding a patent therefor, based on a discovery made after the final patenting of the Colorado Central lode, has no right, as such proprietor, to recover his lode underneath the Colorado Central lines of the Aliunde lode; the jury believe from the evidence to be a part of the same lode as that on which the Colorado Central patent issued."

5. The court erred in refusing to give defendant's instruction No. 3, to wit:

"The court instructs the jury that the proprietor of a lode which comes on its dip within the side lines of another lode has no right to recover in this action such lode, although he may have the right to penetrate underneath the side lines of another lode and extract ore."

6. The court erred in refusing to give defendant's instruction No. 4, to wit:

"The court instructs the jury that it appears from the evidence that the Colorado Central lode was entered and the patents finally issued before the first step in the patenting of the Aliunde claim.

That is to say, before the discovery of the Aliunde claim, and that as said lode has been worked west under the testimony it either follows the apex, or if it loses the apex it still retains underneath its side lines a portion of the lode. That is to say, so much of the lode as dips underneath, and the said Colorado Central having been patented on a discovery made on its apex before the first step in the initiation of title to the Aliunde lode, the Colorado Central owners have the right to hold such portion as they inclose within their side lines extended vertically downward as against a claim of a subsequent location on the said vein, although such vein penetrated underneath the Colorado Central side lines."

7. The court erred in refusing to give defendant's instruction No. 7, to wit:

"The court instructs the jury that if they believe from the evidence that the plaintiff has a vein whose apex is within his own ground, and the defendant also an apex within his ground, and two lodes shown on said apex, if there be two lodes come together in their downward course, that the defendant is entitled to the entire vein below the point of union."

8. The court erred in refusing to give defendant's instruction No. 8, to wit:

"The court instructs the jury that if the defendant has proved up from its lower workings, where it is conceded that it has made certain raises, and has followed those raises up on a streak or seam of crevice material containing mineral, that such streak or seam (if
the jury believe there are several lodes between the porphyry
101 dykes) constitute a lode within the meaning of the law, and it makes no difference whether it carries more or less mineral than the seam on which plaintiff may have sunk, or whether it would pay to work."

9. The court erred in refusing to give defendant's instruction No. 9, to wit:

"The court instructs the jury that if they find that in the raise alleged to be carried to the surface in the Herrick raise, in the O'Malley raise, or in the shaft of the Jim Hall tunnel, there is a streak or seam of mineral, constituting a lode under these instructions, that it makes no difference that such seam or streak is *caused* by plaintiff's witnesses a spur or any other derogative term."

10. The court erred in refusing to give defendant's instruction No. 10, to wit:

"The court instructs the jury that a spur is a small streak or seam of crevice material, or mineral, or both, going off into the country or adjoining rock, but that if such seam as continuity ore contains mineral that will show an essay of an ounce or more, or mineral apparent to the eye, such as miners would follow, it constitutes a vein or lode within the meaning of the law, notwithstanding the fact that witnesses may designate it as a spur or feeder, or by some other derogatory term."

11. The court erred in refusing to give defendant's instruction No. 11, to wit:

"The court instructs the jury that if they find for the plaintiff

they must designate at what point east and west his claim, which he calls the north vein, forms a junction with any vein claimed by defendant; must define the boundaries, east and west, in the plane of union with such certainty that a writ of possession may issue accordingly, and if they find that the plaintiff has a separate vein apexing within his ground or a certain number of feet going east and west, they must also find where it unites with another vein of the defendant which has an apex within defendant's ground, and if such be the case that the vein so unite, they can find for the plaintiff only for the ground above the plane of junction."

12. The court erred in refusing to give defendant's instruction No. 12, to wit:

"The court instructs the jury that if they find from the evidence that the territory in dispute, and which the plaintiff seeks to recover, lies within the surface boundaries extended downward vertically of mining claims belonging to the defendant, and that said mining claims so belonging to defendant were discovered, located and patented prior to the discovery, location and patenting of the claims by means of ownership of which the plaintiff asserts his right to the territory in dispute, then their verdict must be for defendant as to such portion of the ground in dispute as lies within said older
102 locations of the defendant."

13. The court erred in refusing to give defendant's instruction No. 14, to wit:

"The court instructs the jury that if they should find from the evidence that the defendant's claim, the Colorado Central, is located upon the same lode upon which the plaintiff claims his Aliunde No. 2 Lode mining claim, then, since it is admitted that the Colorado Central mining claim is the older location and was patented before the discovery claimed to have been made by the plaintiff of the Aliunde No. 2 the verdict of the jury must be for the defendant."

14. The court erred in refusing to give defendant's instruction No. 16, to wit:

"The court instructs the jury that if they should find or believe that there are several separate or different veins or lodes, and that one or more of them have their outcrop within the boundaries of plaintiff's property, and thence descend upon their dip into defendant's property, and also find that there exist other veins having their outcrop or apex within the boundaries of defendant's claim, and that these latter claims descend into and connect with the stopes and ore bodies claimed by the said plaintiff within the surface boundaries, extended downward vertically, of the defendant, then as to such ore bodies the verdict of the jury must be for the defendant, because their apex lies within the territory of the defendant, and to the extent the said apexes lie within the surface boundaries of the Colorado Central vein, the verdict from the point of junctions, if there should be found a junction, of the vein alleged to outcrop within the plaintiff's property, thus outcropping within the Colorado Central, is the property of the defendant, because the Colorado Central is the older discovery and location."

15. The court erred in charging the jury as follows:

"And again, in so far as the lode is within the location by its top and apex (the court referring to the Aliunde, No. 2 lode), he (referring to the plaintiff) has the right to follow it to any depth to which it may go, although it entered land adjoining."

16. The court erred in charging the jury as follows:

"Now, the question which is presented by the evidence here, is whether in this belt or zone of country which the witnesses have described before you so fully and at such length, the condition of things exhibited to you by the testimony and by these maps and models is of one kind or the other; whether in this belt of country, which the witnesses have described, there are several lodes or veins, or whether it shall all be taken to be one.

"Counsel for defendant insist that between the porphyry walls which extend throughout this territory, or which it may be fair to assume extend throughout the territory in greater or less strength, the condition is that the whole country is broken up, the entire space between the two walls is broken up to such an extent, and so far mineralized that it shall be taken to be one *load* only. The position of the plaintiff is that in this same space there are
103 several lodes or fissures which should be separately regarded, and should be taken to be separate and distinct lodes or veins."

"There is some difficulty undoubtedly in accepting the defendant's theory, in consequence of the development of a body of mineral upon the north side of the north wall of porphyry, because you cannot well say, if there be something to the north side there of value, another body of ore, which so far as developed is quite as distinct and full in every measure as that upon the south side, you cannot well say that his north wall or zone, or belt of porphyry, is a wall of a lode; and if you do not accept that as a wall, then where shall the wall be fixed on the north side of that; where shall we say that it is?"

"But I do not want to enter into the discussion of the testimony. The counsel have done that, and I do not even wish to express an opinion to you upon it. I wish to bring before your minds clearly the question whether this region in which the several bodies of ore are found was so broken up, by whatever force was at the openings, which undoubtedly exist in these rocks, was broken up and afterwards mineralized by the agencies which were at work there, as to constitute one vein or lode, or whether the rents and fissures which it is said have been followed in various workings, the stopes, levels and drifts, whether they are of a separate and distinct character. That is clearly a question for a jury, and it seems to me, upon its determination your finding should be made almost entirely. That is the principal question for your consideration, although, as I shall presently mention, there may be something more."

17. The court erred in charging the jury as follows:

"As connected with that question, maintaining as defendant does the proposition in all its testimony and in argument that the whole space comprehended in all the workings is to be taken only as one lode, it nevertheless seeks to maintain before you that if plaintiff's

view be accepted by you, and that defendant has what may be regarded as a north vein coming to the surface somewhere near the north side line of the Colorado Central location, or north of that, it may claim all below the point of union between the veins, under such an outcrop as that. I do not think that *can* a question for your consideration. The defendant making the issue that the lode is one; that the entire space covered by the workings is but one lode; that a broad outcrop top or apex extends from somewhere in the Aliunde, No. 2, ground northward through and across the Colorado Central ground, is not at liberty to change the issue by saying that there are several veins, and asking you to find on that hypothesis that there is an outcrop under which it may claim from the junction of the two and below that."

18. The court erred in charging the jury as follows:

"But if that were not true, there is no evidence before the jury upon which we can locate that outcrop to any considerable extent. That is to say, if there is an outcrop, top or apex shown in 104 the Herrick raise and in the O'Malley raise, and in the shaft which comes down from the Jim Hall tunnel, we are unable to say whether that falls within the Colorado Central location to any considerable extent; the Aliunde patent is senior to the Colorado Central Extension patent, and to the other patent which was mentioned as belonging to the Nolan and Gilmer parties; or at least it is senior so far as the issues in this case are concerned. If defendant, relying upon that, intended to put itself upon the ground that there are several veins in this territory, and that it is entitled to hold the norther-most one, and all below the point of junction under its location, it would be incumbent upon it to show the location or the top and apex throughout the territory in controversy, so that it may seem whether it is senior or junior to the plaintiff's patent."

19. The court erred in charging the jury, being the charge delivered in absence of counsel, as follows, to wit:

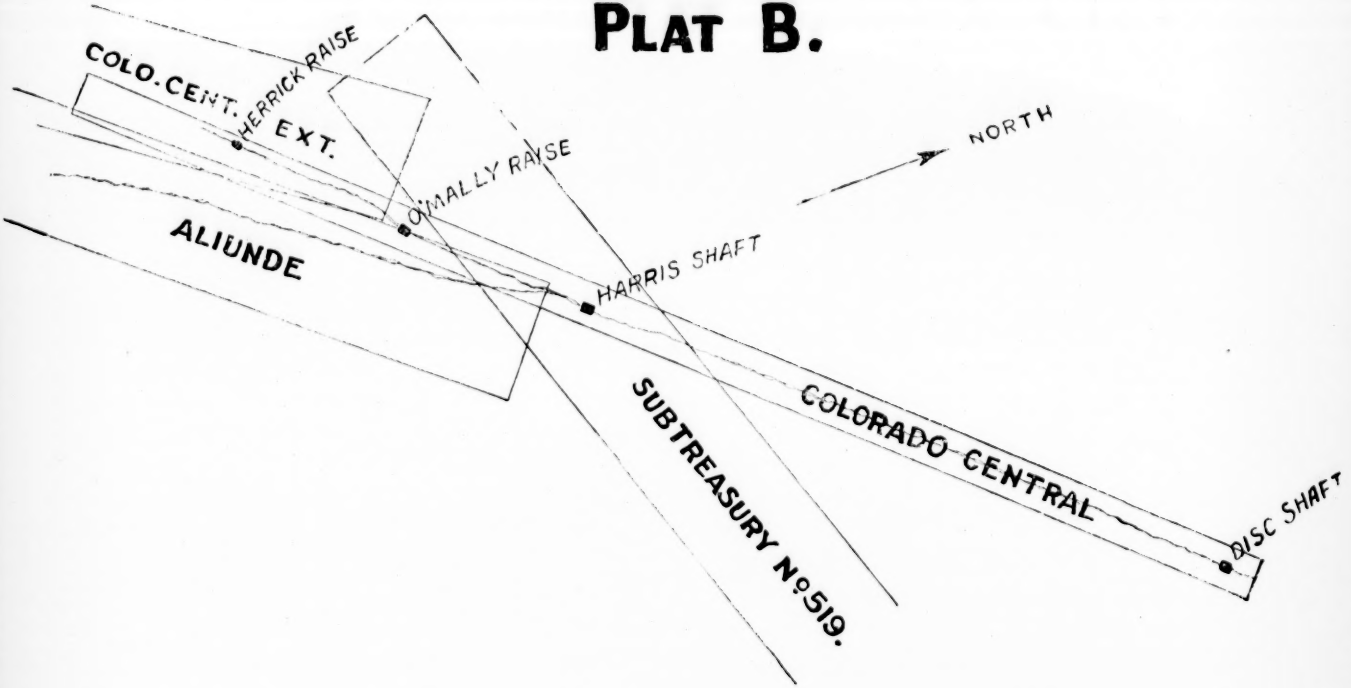
"That is to say, the jury asked the court whether or not, if they were satisfied from the evidence that there was an apex of a lode disclosed in the Herrick raise, whether the proof of such lode in such raise would justify a finding for defendant; to which interrogatory of the jury the court answered that such fact could not avail to the defendant as proof of an apex within the meaning of the law, unless the jury should be of the opinion that the lode is of the width claimed by defendant. Evidence of such apex is of no weight except as affecting the width of the lode at the surface. If the jury should believe the lode to be as claimed by defendant, and this to be a part of the general outcrop, it might be sufficient to sustain defendant's view of the case.

20. The court erred in overruling defendant's motion for a new trial.

All of which will more fully appear by reference to the record and bill of exceptions herein.

CHAS. J. HUGHES,
MORRISON & FILLIUS,
Attorneys for Defendant, Pl'ff in Error.

PLAT B.


COLO. CENT. EXT.
HERRICK RAISE
O'MALLY RAISE
NORTH
ALIUNDE
HARRIS SHAFT
SUBTREASURY No 519.
COLORADO CENTRAL
DISC SHAFT

Wherefore, for and on account of the errors so assigned, said company, the pl'ff in error, prays that judgment be reversed.

CHAS. J. HUGHES,
MORRISON & FILLIUS,
Att'ys for Pl'ff in Error.

Indorsed: 1862. U. S. circuit court. John Turck *vs.* Colo. Cent. Consol'd M'g Co. Assignment of errors. Filed Sept. 16th, 1891. Robert Bailey, clerk U. S. circuit court.

105 "B."

Opinion of Circuit Court of Appeals.

United States Circuit Court of Appeals, Eighth Circuit.

No. 42. October Term, A. D. 1891.

Colorado Central Consolidated Mining Co., Plaintiff in Error, *vs.* John Turck, Defendant in Error.	In Error to the Circuit Court of the United States for the District of Colorado.

Before Caldwell, circuit judge, and Shiras and Thayer, district judges.

This was an action at law brought by the defendant in error to recover possession of a mining lode or vein known as the Aliunde Tunnel lode No. 2, situated in the Argentine mining district, Clear Creek county, State of Colorado. The plaintiff in error, who was defendant in the lower court, is the owner and is in possession of three mining claims known respectively as the Colorado Central, the Sub-treasury and the Colorado Central Extension claims. The Aliunde claim belongs to the defendant in error, and adjoins the Colorado Central claim on the south and at its northern end also abuts against the Sub-treasury claim. The accompanying diagram (plat B) shows with sufficient accuracy the relation of the several claims to each other, their general direction, and the manner in which they adjoin and in some places overlap on the surface of the earth.

(See plate marked plat B, p. 105.)

106 The region of country where these claims are laid is mountainous, and the surface is broken to a considerable extent by ridges and ravines. As a general rule the granite—or, as it is usually termed, the country rock—in which the ore fissures are found, lies from fifty to one hundred feet below the surface of the earth, and is covered to that depth with a slide or wash from the mountains consisting of loose gravel and detached boulders. By reason of that fact, as the evidence shows, it is and was a difficult task to trace the true apex or outcrop of a vein at the surface of the country rock. On the trial in the lower court the defendant in

error maintained, and offered considerable evidence tending to show, that he had the apex of a mineral-bearing vein within the side lines of the Aliunde claim and had traced the apex or outcrop of that vein for some distance within the boundaries of his claim; that the vein became divided a short distance below the surface of the country rock forming a north and south vein (so termed), as shown on the accompanying diagram (plat A) the same being a transverse section;

(See plate marked plat A, p. 106.)

that the north vein had a dip to the northwest of about seventy degrees from the horizon, and at a distance of about sixty feet below the outcrop or apex passed under the south side line of the Colorado Central claim; that the south vein descended into the earth with a slight dip to the northwest, but eventually passed under the south side line of the Colorado Central and on its strike and dip also became united with the north vein underneath the Colorado Central claim. On the other hand, the plaintiff in error stoutly maintained before the jury (and this seems to have been its chief contention) that both the Colorado Central and Aliunde claims were laid on one and the same broad lode which was from one hundred to two hundred feet wide and was confined between two porphyry walls; that neither party to the suit had the apex of this broad lode exclusively within the boundaries of their respective claims and that in view of that fact, the defendant in
107 error had no right under the statutes of the United States (sec. 2322) to follow his alleged vein outside of a vertical plane extended downward through the side lines of his claim. In addition to the main defense last mentioned the plaintiff in error presented three other defenses in the form of instructions, which defenses it may be conceded were not distinctly outlined by the pleadings, and all of which the circuit court overruled. Without pretending to state the exact language of the several instructions last referred to, it will suffice to say that the court was asked to declare in substance: (first) that if the plaintiff below had the apex of what might be termed an independent vein within his own side lines, and the defendant below also had the apex of an independent vein within its side lines, and the two veins descending downward became united within the side lines of the Colorado Central claim, then the defendant was entitled to hold all of the vein from the point of junction downward, because it was the owner of the senior patent; (second) that the proprietor of the Aliunde claim was in no event entitled to recover his vein within the side lines of the Colorado Central claim, because the latter claim was patented before the discovery on which the Aliunde patent rested; and (third) that the proprietor of the Aliunde claim was not entitled to recover his vein under the Colorado Central claim (the latter being held under the oldest patent) if the jury believed the Aliunde lode "to be a part of the same lode as that on which the Colorado Central patent issued."

As the jury found against the plaintiff in error on its main con-

SLIDE
ALIUNDE NO2 COLO. CEN.
COLO. CENTRAL EXT.
BED ROCK
S. ORE CHANNEL OR TURCK'S S. VEIN.
INTERMEDIATE ORE CHANNEL OR TURCK'S N. VEIN.
ORE CHANNEL IN HERRICK RAISE.
PETERSON STOPE
ORE CHANNEL IN POLLARD RAISE.
S. LINE COLO CENTRAL
N. LINE COLORADO CENTRAL

PLAT A.

tention that there was only one broad lode covered by the several claims, and as that issue was submitted under directions from the court that are not challenged, the most important questions that we have to determine concern the action of the lower court with reference to the three other defenses above outlined. Of the four claims above mentioned the Colorado Central claim appears to have been held under the oldest patent. The Aliunde claim, however, was patented before the Colorado Central Extension claim.

Mr. C. J. Hughes and Mr. R. S. Morrison for plaintiff in error.

Mr. Willard Teller and Mr. Harper M. Oragood for defendant in error.

THAYER, district judge (after stating the case as above) delivered the opinion of the court.

The circuit court appears to have refused the two instructions embodying the first of the three propositions above stated, on the ground that such instructions changed the issue which the defendant below had made during the progress of the trial, and for the further reason that the evidence was insufficient to warrant the jury in finding that there were separate and independent veins, one of which had its apex within the Aliunde claim and the other within the side lines of the Colorado Central. We are satisfied that the trial court erred in so far as its refusal to give the instructions was based upon the ground that they changed the issue and presented a defense which the defendant was not entitled to make. The action was in ejectment and the issue raised by the pleadings was whether the plaintiff in the lower court was the owner and entitled to the possession of the alleged vein
168 having its apex within the Aliunde claim, after the same had passed under the Colorado Central side lines. In support of the negative of that issue the defendant had the right to show any fact which disproved the allegation of ownership and right of possession. It was at liberty to say that the alleged vein having its outcrop within the Aliunde claim was not a separate and independent vein, but simply one of numerous ore channels which together formed one broad lode having its apex partly in the Aliunde claim and partly in the Colorado Central; or, failing in that contention, it had the right to show that both parties had the apex of separate veins within the boundaries of their claims, which veins in descending became united within the side lines of the Colorado Central. It is true that these propositions were inconsistent in the sense that the proof of one necessarily disproved the other, but considering the nature of the action we do not regard that as an insuperable objection to the allowance of both defenses. It frequently happens in ejectment suits that a defendant is permitted to derive title from several independent sources, and to defend his possession by setting up several conflicting outstanding titles. When, as in ejectment or replevin, a party is permitted to allege generally that he is the owner and entitled to the possession of certain property, the opposite party

must be allowed to show any state of facts that tends to disprove such assertion.

The second ground on which the trial court based its refusal to give the instructions asked by the defendant is entitled to more weight. The defense that these instructions raised was predicated on the last clause of section 2336 of the Revised Statutes of the United States, which is as follows: "Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purposes of the convenient working of the mine. And where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection." The trial court directed the jury to disregard the defense based on this section of the statute, not only because it changed the issue, but for the reason as stated in its charge, that there was no evidence to locate the outcrop to any considerable extent of a separate vein within the Colorado Central side lines, and for the reason that if there was such a vein it was impossible to say from the testimony whether it had its apex within the Colorado Central side lines or within the side lines of claims adjoining it on the northwest which were held under patents junior to the Aliunde patent. In other words, the circuit court appears to have been of the opinion that the developments made and proven by the defendant company were insufficient to establish the existence of a vein within the meaning of section 2336 which in its descent united with the Aliunde vein. It is manifest, we think, that there was no evidence to prove the existence of the vein or the outcrop in question, except such inferences as might be drawn from the developments in the Grant raise, the Herrick raise, the O'Mally raise and the shaft sunk in the Jim Hall tunnel. These raises were put up some time after the owner of the Aliunde in the
109 development of what is termed his north vein had passed under the Colorado Central's south side line, and they were put up, it seems, by the defendant company, not for the purpose of obtaining ore, but solely for the purpose of demonstrating either that there was but one wide lode between the porphyry walls, or that one fork of the vein on which the owner of the Aliunde was working had its outcrop within the Colorado Central side lines, and that the defendant was entitled to the vein below the point of junction. The Grant raise and the Herrick raise were put up at about the same inclination, and together extended from the defendant's third level nearly to the surface of the country rock. The Herrick raise was much shorter than the Grant raise, and was merely an extension of the latter in the direction of the surface. It was not claimed by the defendant company that the Grant raise had been put up on what might be termed a continuous streak or seam from the third level, nor was there any satisfactory evidence that such alleged ore streak as had been followed in that raise fell into the Peterson stope below the third level, into which the Aliunde vein had been traced and had descended. It was proven, however, by

the defendant that a seam or vein varying from half an inch to an inch in thickness had been traced in the Herrick raise nearly to the surface, but the plaintiff's evidence tended strongly to show that the so-called vein in the Herrick raise was purely local, that it was not followed downward in the Grant raise, and did not extend for any considerable distance on either side of the raise in the direction of its strike. No stoping had been done by the defendant along the Herrick raise or the Grant raise. Moreover, the Herrick raise as well as the O'Mally raise had been put up so near to the north boundary line of the Colorado Central claim, that it was somewhat doubtful, under the testimony, whether the ore channels that had been followed in these raises had their apex within the Colorado Central side lines or within the lines of other junior claims next adjoining it on the north. The O'Mally raise, on which the defendant also relied to establish the existence of a separate vein with an apex within its own side lines, had been put up from the second level nearly to the surface, at a point about two hundred and fifty feet northeast of the Herrick raise. Some stoping had been done by the defendant at the foot of the O'Mally raise, but the stope lay at such an angle as would carry the apex of the vein within the side lines of the Aliunde, if the vein continued at that angle to the surface of the country rock. The O'Mally raise had not been extended downward below the second level: it was accordingly a matter of speculation where the alleged ore channel on which the stoping had been done would lead to in its descent, or whether it extended for any considerable distance below the foot of the raise. About midway between the Herrick raise and the O'Mally raise, at the third level, the Benny cross-cut had been run, which tended strongly to demonstrate that no connection existed between the veins in the Herrick and O'Mally raises, and that both were merely local veins of no considerable extent or significance. The shaft above referred to as having been sunk in the Jim Hall tunnel seems to have been still further to the northeast, and is not shown on any of the drawings or models submitted to our inspection. The developments in that shaft, whatever they may have been, throw no light on the question now under consideration so far as the present record discloses. On the other hand, the evidence offered by the owner of the Aliunde had a strong tendency to show that he had the apex for a considerable distance within his side lines of a well-defined vein with the usual hanging and foot walls, which descended into the earth with a uniform dip at least to the 500-foot level. Levels had been run and shafts had been sunk to determine both the dip and the strike of the vein, and, what is of more importance, considerable stoping had been done along the vein on all of the levels. In view of these facts we must conclude, as the circuit court appears to have done, that the evidence tending to show the existence of a separate vein with its apex within the Colorado Central boundaries which descended and formed a junction with the Aliunde vein was too uncertain and speculative to warrant the submission of that issue to the jury. Great difficulties, no doubt, stood in the way of

furnishing other and better evidence of the existence of the supposed vein within the defendant's territory, but we are persuaded that a finding in favor of the defendant, based upon such evidence as was offered, would have rested too largely upon speculation and too little upon legitimate inferences of fact to be tolerated in a judicial proceeding. There was no error therefore in the charge of the lower court so far as this issue was concerned or in its refusal to give the defendant's instructions presenting the issue.

The defendant's second proposition above outlined was based on a construction of section 2322 of the Revised Statutes of the United States, the material part of which is as follows: "The locators of all mining locations heretofore made, or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with State, territorial and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes and ledges throughout their entire depth the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges."

The instruction tendered by the defendant company in effect asked the circuit court to declare that section 2322 does not permit one who locates upon the apex of a lode or vein to follow the vein outside of his side lines and underneath the boundary lines of an adjoining proprietor if the latter holds under a senior patent. As the proposition was stated in the instruction it excluded all consideration of the question whether the Colorado Central Company had or had not first discovered and located the same vein on the dip which the
111 owner of the Aliunde was following underneath its territory.

In other words it asserted that the right given by section 2322 to the holder of the apex to follow his vein on its dip outside of the side lines of his claim is merely a right that can be asserted against an adjoining claimant holding under a junior patent or certificate. We are of the opinion that the instruction as asked was properly refused. It rested upon an interpretation of the statute that cannot be sustained in view of the language employed, and so far as we are aware has never as yet been adopted. In two cases (Pac. Coast Mining & Milling Co. *vs.* Spargo, 16 Fed. Rep., 348, and Amador Medean Gold Mining Co. *vs.* South Spring Hill Gold Mining Co. *et al.*, 36 Fed. Rep., 668) it was held that a patent for agricultural lands issued under the pre-emption laws of the United States, car-

ries the right to all mines underneath the surface to which no right has attached at the time the certificate of purchase or the patent issues, and that a reservation in such patent saving the rights of proprietors of mining veins or lodes, related solely to those proprietors whose rights had attached before the lands were purchased for agricultural purposes. We think that the same effect cannot be given to a patent for a mining claim which appears to have been given in the cases cited to patents for agricultural land. The title acquired by a patent of the former description bears little resemblance to a title conferred by the latter, because it is acquired and held under the provisions of statutes differing widely both in their language and purpose. The statute conferring the right to follow a lode outside of the side lines of a location, when the top or apex of the lode lies within the boundaries of the location, does not in terms or by necessary implication limit the exercise of that right, especially where mining claims are involved, to cases where the adjoining claims are held under junior locations or patents, and we think we would not be justified in placing such a limitation upon the right by construction. The practice of the General Land Office for many years also appears to have been opposed to the existence of any such limitation.

The instruction embodying the third and final proposition above stated was intended, as we are advised by the counsel who drafted it, to present the law applicable to a particular phase of the testimony. The defendant company had begun work on the Colorado Central claim at least six hundred feet northeast of the disputed territory, and had there discovered a vein on which the Colorado Central location and patent appears to rest. From this point it had drifted along the vein on several levels, in a southwesterly direction, until it reached the disputed ground. There was testimony in the case having a tendency to show that the Colorado Central vein forked as it entered the disputed territory, and that the apex or outcrop of one of the forks (that on which the Aliunde location rested) had departed from the Colorado Central side lines and was within the Aliunde location, although by reason of the dip a portion of the fork of the vein was still underneath the Colorado Central claim. We are advised that by reason of this phase of the testimony the instruction now under consideration was tendered, the intent being to obtain a declaration, that upon the state of facts last mentioned the proprietor of the Aliunde could not follow the fork of the vein outside of his side lines, he being
112 a junior patentee, although the outcrop was within his own boundaries. The instruction was not very well calculated to enlighten the jury, because it did not contain a sufficient statement of the facts upon which it was predicated to render it intelligible. But waiving that objection, we think it was bad for other reasons. Upon the assumption that the Colorado Central vein had divided on its strike to the southwest, and that the defendant company had lost the outcrop of one if not both forks of the vein by reason of the narrowness of its claim—we fail to perceive upon what principle it could claim the fork of the vein—the outcrop of

which had been lost. If the vein on which the Colorado Central location rested became divided as it entered the disputed territory, and the outcrop of one fork crossed into the Aliunde territory, then it followed that the Colorado Central claim had been laid rather obliquely to the course of the outcrop, and in that event we are of the opinion that the defendant lost that fork of the vein which had passed outside of its side lines. In other words, so far as that fork is concerned, the south end line of defendant's Colorado Central claim must be regarded as a line drawn through the point where the outcrop passed through its south side line. There was no error, therefore, in the refusal of the instruction. Argentine Mining Co. *vs.* Terrible Mining Co., 122 U. S., 478; Mining Co. *vs.* Tarbet, 98 U. S., 46; Iron Silver Mining Co. *vs.* Elgin Mining & Smelting Co., 118 U. S., 196–209.

Two questions of practice are also presented by the plaintiff in error which remain to be considered. The record shows that after the jury had been instructed and had retired, they asked for further directions as to a certain question of law, and that they were recalled and further instructed by the court on that point and none other; and in this connection it may be said that the direction so given was merely a repetition in substance of a portion of the charge to which counsel for the defendant company had already saved their exception before the jury retired. The record recites that "to the giving of said instruction (*i. e.*, the one in response to the inquiry of the jury) said defendant specially objects and excepts for the reason that the same was given without counsel for defendant being present as well as for the reason that the said instruction was contrary to law." We are not advised by the record any further than is above stated of the details of the transaction of which complaint is made, and we think it manifest that the transaction as stated will not justify a reversal of the cause. The rule we concede is well established that there ought to be no communication between the judge and jury after the latter have been charged and have retired to consider of their verdict, unless the communication takes place in open court, and if practicable, in the presence of counsel on the respective sides. Bank *vs.* Mix, 51 N. Y., 558; State *vs.* Patterson, 45 Vt., 308; O'Conner *vs.* Guthrie, 11 Iowa, 80; Chouteau *vs.* Jupiter Iron Works, 94 Mo., 388–400; Stewart *vs.* Wyoming Cattle Ranch Co., 128 U. S., 383–390. But in the present case the communication complained of evidently took place in open court, and if defendant's counsel were not present, as their exception recites, it may have been due to their own fault, in absenting themselves from the court-room when they should have remained in attendance. In the absence of any showing as to the
113 cause of their absence or as to whether any efforts were made to secure their presence, we are bound to indulge in every presumption in favor of the regularity and propriety of the court's action.

Complaint is also made that the verdict of the jury is too general, and that it does not define the boundaries of the disputed territory east and west in feet and inches, as an engineer might perhaps have

done by an actual measurement. We think this objection is likewise untenable. The complaint filed in the circuit court described the disputed premises with all reasonable accuracy and certainty as "so much of said Aliunde Tunnel Lode, No. 2, mining claim and premises, as lies beneath the depth of 300 feet beneath the surface of the ground, north of the north side line of said Aliunde Tunnel lode, carrying said north line down vertically, and from thence on the pitch of said lode northwestwardly, and measuring thence along the line of said Aliunde Tunnel lode, No. 2, a distance of six hundred feet next west of the northeast end line of said claim;" and the jury, by their verdict, found the issues joined for the plaintiff, and further found that the plaintiff was "the owner in fee of the lode and premises described in the complaint, and was entitled to the occupation and possession thereof." In view of these facts the objection taken to the verdict, on account of its generality, is certainly without merit. In entering final judgment it seems that the circuit court did not award all of the premises to which the plaintiff was entitled by the verdict of the jury, but that is an error of which the defendant company cannot be heard to complain. Upon the whole, therefore, we find no material error in the record, and the judgment of the circuit court is accordingly affirmed.

Filed May 9, 1892.

114 "B."

United States Circuit Court of Appeals, Eighth Circuit, October Term, 1891, Tuesday, May 9th, 1892.

THE COLORADO CENTRAL CONSOLIDATED MINING COMPANY, Plaintiff in Error,
vs.
JOHN TURCK, Defendant in Error. } No. 42.

In error to the circuit court of the United States for the district of Colorado.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Colorado, and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed with costs, and that said John Turck recover against the said Colorado Central Consolidated Mining Company twenty dollars for his costs herein expended and have execution therefor.

May 9th, 1892.

115 "C."

Petition for Rehearing.

In the United States Circuit Court of Appeals, Eighth Circuit.

THE COLORADO CENTRAL CONSOLIDATED MINING COMPANY, Plaintiff in Error,
vs.
JOHN TURCK, Defendant in Error.
No. 42.

To the honorable the judges of said court:

In asking for a rehearing, we are aware that doubtful questions must be conceded and the largest latitude allowed to divergence of opinion between counsel and the court, and that only where counsel can see, or think they can see, that the court has overlooked some material point or misunderstood some material fact, it is then their duty to the court, as well as to their clients, to call the attention of the court to such oversights or misconceptions and ask the court to reconsider them.

1. Verdict gives plaintiff more than pleadings claim and more than the evidence proved.

By the record, the judgment now to stand affirmed, as the present impression of the court intimates, gives the plaintiff fifteen feet more ground than, by his pleadings, he claims.

116 The amended complaint called for 600 feet. The replication conceded our apex at a point 150 feet from the "Harris" shaft. This left to the plaintiff but 505 feet to such point. The plaintiff in his own pleading adopted the "Harris" shaft as a known monument, and the line drawn by the court gives plaintiff 520 feet, which is fifteen feet more than his pleadings claim, or 100 feet more ground than by his evidence he attempted to prove.

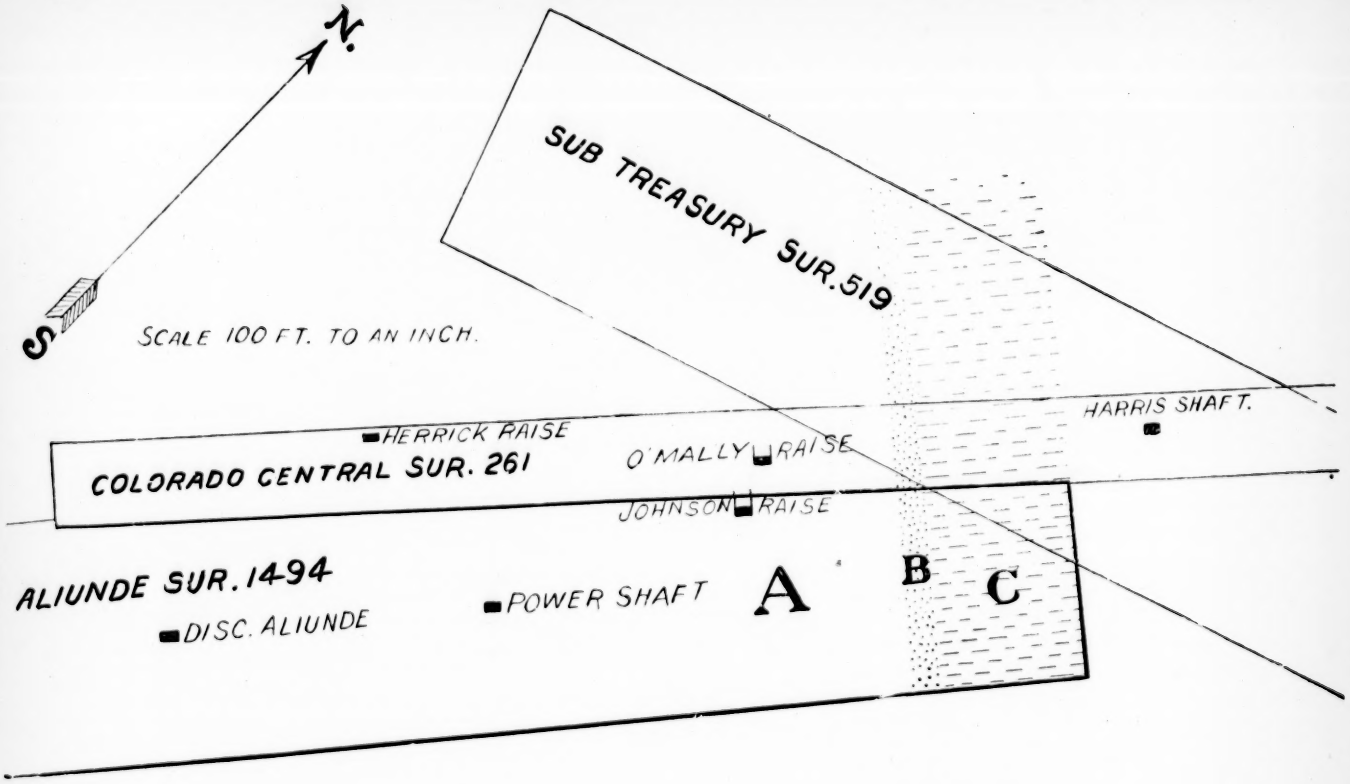
This point can be clearly understood from the annexed plat, drawn to scale, showing the limit of the ground claimed by plaintiff in his pleadings, the limit of the ground to which his proof of apex extended, and the limit for which he received judgment.

The replication says (fol. 12) "that at the last-named point (150 feet southwest from the 'Harris' shaft) said 'Colorado Central' lode leaves the southeasterly side line of said survey 261 ('Colorado Central' lode) and passes outside of said survey lot into No. 1494 (the 'Aliunde'), owned by plaintiff."

We must assume, of course, that the court knows and holds that a replication corrects a complaint, restrains it, amounts to a new assignment.

In the original complaint plaintiff claimed only 400 feet. He was allowed to amend by claiming 600 feet. In the replication he cut it down to 505 feet, and the court gave judgment for 520 feet.

This is not a case of immaterial variance, as this fifteen feet is of very great value, from which much ore has been taken and much more remains to be taken.


N.
S.
SCALE 100 FT. TO AN INCH.
SUB TREASURY SUR. 519
HARRIS SHAFT.
HERRICK RAISE
COLORADO CENTRAL SUR. 261
O'MALLY RAISE
JOHNSON RAISE
ALIUNDE SUR. 1494
DISC. ALIUNDE
POWER SHAFT
A
B
C

As to the proof—the apex of plaintiff is proved only to the Johnson raise, which is just 100 feet short of the 505 feet claimed. Measuring the other way, it is 250 feet from the "Harris" shaft, or 405 feet from the west end of the ground sued for.

The result is a judgment for fifteen feet more than his pleadings asked, or 115 feet more than he proved an apex for, as there is no development or proof of an apex to the "Aliunde" east of the "Johnson" raise.

(See plate marked Sub-treasury 519, p. 117.)

118 In addition to taking from the consideration of the jury the question of to what extent the plaintiff had the apex of the vein claimed to belong to the "Aliunde" lode, and thus preventing the jury from ascertaining the point, properly a question of fact, where the line of this apex crossed over the "Colorado Central" line into the "Aliunde" claim, the court also took from the jury, by the charge given, and also by refusing to give the charge upon that subject requested by the defendant, a further highly important and necessary question of fact upon which there had been controversy in the evidence—that is, at what depth below the surface the alleged "Aliunde" claim crossed into the workings made by defendant within the "Colorado Central" surface lines.

The pleadings of the plaintiff assert that upon its dip the "Aliunde" vein crosses the "Aliunde" side line extended downward vertically and passes into the "Colorado Central" claim at a depth of about 300 feet below the surface (fol. 2), and in the evidence it was contended by the defendant that the ore measure or lode of the defendant came into certain stopes—the "Peterson" stope and others—made by the defendant, at a certain number of feet below the top of the stope, so that within the lode claimed by the "Colorado Central" and above the point of connection with what was called the "Aliunde" lode, large and valuable quantities of ore had been mined, to which, of course, no title could be asserted by the plaintiff for the reason that where two veins unite upon their dip, the older location will take the ground in intersection and all below it, and, whatever other result might follow upon the evidence, the jury, in fixing the limits or boundaries, as in law was their province, exclusively, would have to determine the rights and recovery of the plaintiff on this conflicting evidence, whether certain stopes were above the line upon which plaintiff's vein entered, or below it.

Much evidence was offered by plaintiff to show the points at which the various stopes made by the defendant were entered by the vein claimed by the plaintiff, and a mass of countervailing evidence was introduced on behalf of the defendant to show that the vein claimed by the plaintiff passed into these stopes at lower points, so
119 that as a result, if this evidence was true, much of the ore mined from these stopes could, under no circumstances, be the property of the plaintiff, even if he could recover for the ore lying deeper down in the mine and below the point where actually,

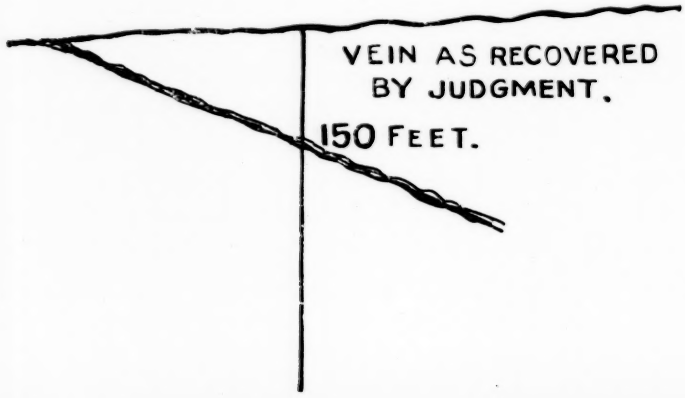
as that fact might be found by the jury, plaintiff's lode passed into these stopes.

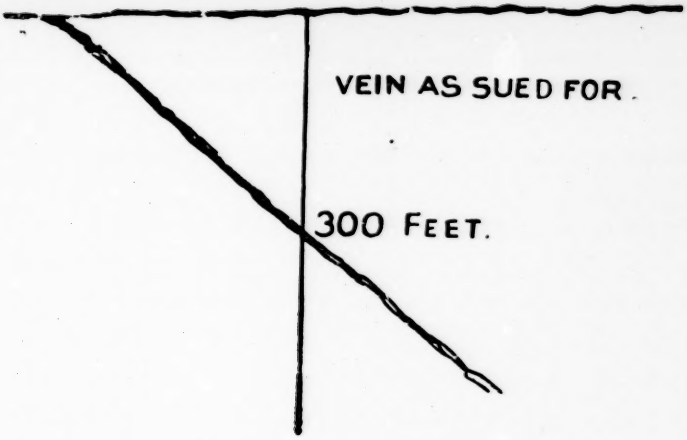
This question is of equal importance with that of determining the length of apex to which the plaintiff might be entitled in determining whether or not the ore mined was upon the vein apexing within the "Colorado Central" line, instead of within the "Aliunde" lines.

The court, however, proceeded upon the theory that even if there was evidence upon each side of such a character as to make the distinct issue of fact upon the length of apex owned by plaintiff, and at what depth, if at all, his vein, upon its dip, passed into the workings of and united with the ore bodies therein mined by the defendant, that the court would withdraw the determination of both these questions, being the questions which determine the extent, by definite boundaries, of the plaintiff's claim, from the jury's consideration—would, upon these points, and did direct the jury to make a general finding for the plaintiff—and the court thereupon would fix and determine these boundaries, without any actual finding or consideration by the jury upon the subject. The verdict found in view of these circumstances and after the withdrawal of these questions from the jury by the court was not a finding by the jury for the plaintiff upon the question of the limits and boundaries of his right.

The judgment does not fix the plane at which the "Aliunde" enters the "Colorado Central" claim, nor limit it to ground lower down than 300 feet, and, in fact, on the evidence the alleged vein at points enters the "Colorado Central" ground 150 feet below the surface. So that, discarding the complaint, a large part of the ground above a plane 300 feet below the surface, is recovered by the judgment.

120





This court, in its opinion, says that the jury found generally for the premises "described in the complaint," and that the court below gave judgment for less, making it error, of which defendant would not complain. Of course, the jury found generally for the plaintiff because they were distinctly told that the court would fix the limits, the court at the same time refusing our instruction (assignment No. 11) telling the jury to fix the boundaries.

121 The court overlooked in its judgment both the admission in the replication and the limitation in depth as to the entry of the "Aliunde" vein into the "Colorado Central."

We contend that the court erred in reserving the right to itself to fix the boundaries; it is error *per se*; it is essentially the province of the jury.

The question of boundary is always a matter of fact for the jury. It is the province of the court in ejectment to instruct the jury to fix boundary of the tract under the whole evidence.

Barclay *v.* Howell, 6 Peters, 498.

The boundary of a State, when material, is not a simple question of law, but the application of the evidence in the ascertainment of which belongs to the jury.

United States *v.* Jackalaw, 1 Black., 484.

Where the location of a line is a question of fact, it is proper to be left to the jury without controlling instructions.

Cavazos *v.* Trevino, 6 Wall., 773.

And whether it be so or not, this court will certainly not allow, if they understand it, a judgment to stand for more lineal feet than the pleadings claim, and for the vein at a depth of 150 feet, when the complaint demands it only below a plane at 300 feet depth.

A finding of a jury which contradicts a fact admitted in the pleadings is to be disregarded.

McFerran *v.* Taylor, 3 Cranch, 270.
Peterson *v.* United States, 2 Wheaton, 221.
Garland *v.* Davis, 4 Howard, 131.

The plaintiff, upon proof of title to a part of the premises sued for in ejectment, is not by law entitled to a general verdict for the whole of the premises.

McArthur *v.* Porter, 6 Peters, 205.

2. Taking material issue from jury.

This court says in its opinion that it was error for the lower court to take from the jury the consideration of whether there were two separate veins, one of them apexing within our lines, on the ground

122 that that was changing the issues.

That was the real ground upon which the court took it away, and then added, supportingly: "But if that were not true, there is no evidence upon which we can locate that outcrop to any considerable extent." "If defendant, relying upon that, intended to put itself upon the ground that there are several veins in this territory, and that it is entitled to hold the northeast one, and all below the point of junction under its location, it would be incumbent upon it to show the location of the top and apex throughout the territory in controversy."

When making our exceptions, the court made again, substantially, the same statement to which Mr. Morrison answered:

"That is true. The outcrop throughout the whole case on both sides is only proved in spots on account of the wash."

That expression was literally true. Slide about 100 feet deep covers this entire mine, so that in the "Aliunde" works there was but one open and accessible point (the discovery shaft) where the apex was proved by the plaintiff to the slide. The plaintiff claimed an apex in the "Power" shaft, an isolated shaft so far to the south that no vein in it could possibly belong to any of the plaintiff's drifts, being situate about 140 feet west of the "Johnson" raise and near the center of the "Aliunde" claim. There was possibly also one other point at one of plaintiff's upper short drifts, which it was claimed broke through to the slide, near the discovery, and about 225 feet west of the "Johnson" raise, *i. e.*, 225 feet west of the most easterly point of plaintiff's proof concerning the apex. Plaintiff's witnesses conceded that the top of this raise was twenty or thirty feet below the slide.

It was contended, of course, on behalf of plaintiff, that the vein necessarily extended from one apex point to another, but so far as evidence, other than inference, is concerned, there was nothing by any working which traced or attempted to establish the existence of an apex at intermediate points between the workings above referred to. Upon this evidence and upon these inferences, the jury is instructed to establish the existence of an apex throughout the

entire line when, with much more evidence, with workings
123 nearer together, and more certainty of tracing the vein to its apex at the slide, the court says to the jury, as matter of law, that defendant's evidence is insufficient to be submitted to the jury in order to enable them to find a verdict for defendant on its northerly apex.

An examination of the evidence introduced on behalf of plaintiff and defendant will at once disclose that in character it was alike, but as to force and extent the evidence of defendant was much stronger, the points at which defendant's witness swore to the existence of an apex within defendant's ground being nearer together than the points within plaintiff's ground, at which plaintiff's witnesses claimed the existence of an apex. This being the situation upon the evidence and there being inferences to be drawn from plaintiff's evidence by the jury, based upon the conditions of the respective parties, which would place the crossing of the apex at one point or another, as the jury might accept the judgment and evidence of one class of witnesses or the other, necessarily there was something for the jury to decide, even after the plaintiff's evidence as to location of plaintiff's apex, and, unless it was assumed that the witnesses on behalf of defendant were discredited and had not found in the workings they described the vein and apex to which they swore, then necessarily the court should have submitted the position and extent of the outcrop of the apex, within defendant's lines, to the jury upon the evidence introduced concerning it by the defendant.

In the "Colorado Central" workings the defendant broke through to the slide at the top of the "Herrick" raise—at the top of the "O'Mally" raise—and sunk from the "Jim Hall" tunnel, disclosing, according to the testimony of defendant's witnesses, a well-defined apex in each of these workings and within the side lines of defendant's senior patent—in fact, a much better apex and vein than was disclosed or claimed to exist at the point in plaintiff's workings where he alleged the developments to have disclosed the apex of his vein.

Given an apex at two points on a vein, an apex on the line
124 between those points is a matter of absolute imperative conclusion. A continuous drift under the slide would not demonstrate the existence of an apex more conclusively to the miner than proof of its existence at the two points, where these two points were connected by levels at lower depths, as they were in the case of the "Colorado Central," being the same character of proof relied upon for that purpose by the plaintiff.

Proof of an actual apex was much stronger for defendant than plaintiff. If it be conceded that plaintiff's discovery shaft and his "Johnson" raise proved an apex for the "Alhambra," it could not be and was not contended at the trial that the "Colorado Central" had no continuous apex, provided an apex existed in the "Herrick" raise.

That we are correct in thus stating the evidence and in claiming that the existence of the apex within the "Colorado Central" terri-

tory was at least as strong as that introduced to establish the existence of one in the "Aliunde," is shown by the following quotations from the evidence of the witnesses upon that subject.

Albert E. Chase, page 43 of bill of exceptions:

"There is a good deal more in the 'Grant and Herrick' raise than you can possibly get in the 'Fisher' stope and raise; a great deal better crevice—a better channel—there is more ore; I mean there is a better defined ore channel—that is what I mean to assert."

Page 80: "I never saw such a streak of ore in the 'Johnson' raise as I saw in the 'Grant' raise, and yet there is no doubt that is on a large ore channel. The amount does not determine."

William Byrd Page, page 5:

"The 'O'Mally' raise was but about half its height at the former examination. Since that time it has been run to wash and boulders, or bed rock. It is very wet on that raise, but by going through on the back of this stope one can see that that stope has been worked up to that height on an ore measure. Stoping is discontinued at that point (indicating). The raise is there seen to become vertical before the end of this stope is reached, so it has become a vertical ore measure, and when you see that raise in addition to reaching bed rock you can satisfy yourself that that ore measure has
125 reached bed rock or is a part of the apex of this lode. In the same way, the 'Herrick' raise has gone up from the appearance of the top of it nearly to bed rock. It has not reached the rock and boulders as the 'O'Mally' raise has, but has approached it very closely. That also goes on an ore measure vertically, as far as it could be examined, to the top, and reaching very nearly the bed rock."

Page 10: "Q. Can you tell us how the indications of ore or vein or ore matter found in the 'Johnson' raise and the upraise made from Turck's engine compare with what is found in the 'Herrick,' 'O'Mally' and 'Harris' shaft? A. The ore measures are about the same in any part of the mine. From one side of this lode, or anywhere in the lode, measures will show more or less ore. Then, again, ore measures will show less ore.

"Q. I refer now to the 'Johnson' raise and 'Herrick' raise—how they compare in extent and showing. A. They show about the same condition of affairs. They are each worked up on a slip or succession of slips in each case—just about the same showing in the 'Fisher' as there is in the 'O'Mally.' There has been some stoping in the 'Fisher.' Judging from the appearance, there has been stoping here. One ore measure is about the same as the other. The exact thickness of the ore that has come out, that is a thing that cannot be determined after the stope is made and partially filled up.

"Q. Upon the supposition that these various ore measures are separate and independent lodes or veins, then where do you find the apexes of them, with reference to the 'Colorado Central' territory? A. Principally within the lines of the 'Colorado Central.' The several openings approaching the wash there that I have spoken of by name in detail show the apex of these ore measures, and, if you

consider them separate veins, then the apex would reach the apices of the several veins.

"Q. Are they connected with these stopes and ore bodies shown from there down in the earth? A. They are.

"Q. Connected upon what—in what way? A. Connected upon ore measures."

126 E. Le Neve Foster, fol. 617:

"We come to the 'O'Mally' raise, and we find the apex of the lode right at that point near the center of the 'Colorado Central' patent.

"Here at the 'Herrick' raise, we have also raised up there to top of the bed rock, or close to it, so close that we have been able to drill a hole through the sand and boulders. The 'Herrick' raise also lies in the boundaries of the 'Colorado Central' patent.

"The 'Herrick' raise was raised from the end of the 'Stuart' cross-cut to as near the surface as we could get, and was raised on an ore channel showing ore all the way up it. The ore in that raise was from half an inch up to as much as an inch and a half in width."

The defendants made a contention that we had no sufficient vein in that raise; but it was reserved for the court to say that the vein, such as it may have been, developed in our raises, did not prove an apex between the points at which the surface was struck.

This court says, after reciting the evidence as to this vein:

"We must conclude, as the circuit court appears to have done, that the evidence tending to show the existence of a separate vein, with its apex within the 'Colorado Central' boundaries, which descended and formed a junction with the 'Aliunde' vein, was too uncertain and speculative to warrant the submission of that issue to the jury."

The court is treading on dangerous ground when it decides pure matters of fact, essentially jury questions. The court say there was no stoping done by the defendant at certain points. True; but we were under injunction of the court as to stoping in that ground. The court overlooks the fact that we were directly under the bed of a large creek, and that practical mining was out of the question under the wash at that point. The court overlooked the fact that two raises—the "Herrick" and "Grant"—one practically the extension of the other, had been made, at immense cost, a distance of over 140 feet, and that there was ore, practically, all the way, as shown by

127 specimens exhibited on the trial. There was more ore in these two raises than in the same given height or length of almost any portion of plaintiff's work. In plaintiff's deep shaft, sunk over 300 feet, no ore at all had ever been taken out. There was more ore and a better vein in our raise, made for development, than in the defendant's main working "Aliunde" shaft.

The court say the "Herrick" raise as well as the "O'Mally" raise had been put up so near to the north boundary line of the "Colorado Central" claim that it was somewhat doubtful in the testimony whether the ore channels that had been followed in these raises had their apex within the "Colorado Central" side lines or

within the lines of their junior claims next adjoining it on the north. The court is here mathematically wrong. We use the expression with the full sense of its strength, with all deference to the court. The top of the "Herrick" raise was about ten feet within the "Colorado Central" side lines and only fifteen feet from its center, and the "O'Mally" raise was in the very center of the patent. These two raises had been put up not nearly to the surface, as the court say, but both of them, actually broken into the wash, exhibiting the apex of the vein.

It is true that in the "O'Mally" raise there was an ore streak followed to a certain point, which, theoretically, might by its dip have outcropped in the "Aliunde," but we started from the point where that dip changed, and raised it to the very surface, to prove by demonstration, as against theory, that that ore streak had come straight up under the "Colorado Central" patent.

The evidence of the defendant that this vein had actully been traced and followed to its apex in the slide at the top of this raise is, therefore, of much greater force and value than that of the plaintiff, who calculates mathematically that if certain dips had continued, the apex could have been somewhere else.

If upon any one issue error was committed, either in the admission of evidence or in the charge of the court, a general verdict upon several issues cannot be upheld.

Maryland *v.* Baldwin, 112 U. S., 490.

If the evidence offered conduces, in any reasonable degree, to establish the fact in controversy, it should go to the jury.

128 Republic Fire Ins. Co. *v.* Weide, 14 Wall., 375.

The court cannot instruct on the sufficiency of evidence.

The Chesapeake Canal Co. *v.* Knapp, 9 Peters, 541.

Strother *v.* Lucas, 12 Peters, 410.

When a case depends upon the effect or weight of testimony, it should never be withdrawn from the jury unless the testimony is of such a conclusive character that the verdict in opposition to it would be set aside.

Phœnix Mutual Ins. Co. *v.* Doester, 103 U. S., 30.

It is not proper for a court to instruct the jury that upon the whole evidence the plaintiff ought not to recover if any possible construction of the testimony would support the action.

Bank of Washington *v.* Triplett, 1 Peters, 25.

The court is not authorized to take from the jury the right of weighing the evidence bearing on controverted facts.

Mutual Life Ins. Co. *v.* Snyder, 93 U. S., 293.

Where there is some evidence on the question of fact, it is error for the court to take the question from the jury.

Hickman *v.* Jones, 9 Wallace, 197.

The Charter Oak Life Ins. Co. *v.* Rodel, 95 U. S., 232.

Where the evidence offered had weight enough in it to be pertinent, it ought to be submitted to the jury.

Vigel *v.* Newell, 24 Howard, 208.
Schucherdt *v.* Allen, 1 Wall., 359.

If there be some evidence tending to support the disputed fact, it must be submitted to the jury with proper instructions.

Richardson *v.* Preston, 19 Howard, 263.
Chesapeake Canal Co. *v.* Knapp, 9 Peters, 541.
Hogan *v.* Page, 2 Wallace, 605.

An instruction that would exclude from the jury the consideration of any fact in evidence is erroneous.

Adams *v.* Roberts, 2 How., 486.

129 3. This court holds evidence of the separate apex insufficient when the presumption is that we have the apex, without the need of any evidence.

This has been expressly decided in Armstrong *v.* Lower, 6 Colo., 585; 15 Mining Rep., 458.

The same point has been ruled as to the converse of the proposition by the uniform holding that a party claiming beyond his side lines is *prima facie* a trespasser.

Blue Bird Co. *v.* Murray, 23 Pac., 1022.
Cheesman *v.* Shreve, 37 Fed., 36.

Just before the argument at St. Louis this exact point came up in the supreme court of New Mexico, in the case of Bell *v.* Skillicorn, since reported in 28 Pac., 768.

There the court hold in terms that the whole burden of proof lies upon an apex claimant seeking to dip into an adjoining claim to prove his lode and into the adjoining claim.

Now, if the presumption be that we have the apex—and there can be no other presumption where the outside apex claimant is compelled to prove up to show a separate apex of his own—it seems to us as strange as it is hard to be not only denied that presumption, but, when we make affirmative proof thereof, that the court should take upon itself to say that we have not proved an apex when we have, in either of our raises, far more of a vein than in the entire 300 feet of the "Aliunde" discovery shaft.

4. Importance of this case, both in amount and as precedent, and herein of the holding that our prior title and possession on the dip count for naught.

There is another important and far-reaching question involved in this case. It is to be borne in mind that upon this verdict, by way of an accounting, plaintiff will claim the recovery of about $300,000. In addition to the magnitude of this recovery, is to be added the value of ores yet unmined, the title to which will rest upon the judgment. With regard to the effect of the priority of location, discovery and patent presented by defendant's evidence and the instructions requested upon that subject, it is also of

130 grave importance in numberless other suits now pending in the circuit court of the United States for Colorado and also

in the State courts. The settlement of it requires construction of a Federal statute, and would, if the pleadings had been so framed, have entitled either party to a determination of it by the Supreme Court of the United States; but, as another ground of jurisdiction, to wit, diversity of citizenship, clearly existed, and as the laws were at the time when the suit was brought and when the case was tried, the case would go to the Supreme Court necessarily, this Federal question was not *eo nomine* made the ground of jurisdiction. The value involved in this case and the public and general importance of this question justifies us, we believe, in again calling attention to that question and in making clearer than we seem to have done to the court heretofore the facts in evidence upon which we base our contention.

Upon the evidence of the plaintiff, there is a vein having its outcrop, for a certain extent, within the surface boundaries of the "Aliunde," passing thence upon its strike or course into the "Colorado Central," to the "Harris" shaft, and from the "Harris" shaft, according to the undisputed evidence of the defendant, to the discovery shaft of the "Colorado Central" claim, so that the discovery of the "Aliunde," according to plaintiff's evidence, is upon the outcrop of the same vein, upon the outcrop of which the "Colorado Central" was located years prior thereto. And according to plaintiff's controversy, the ores mined by the defendant, for which recovery is sought, and the vein itself, which is the subject of controversy herein, is a portion of the vein located upon by the defendant, but having, as to that part in controversy, its apex within the "Aliunde" territory, and the question of a fork in the vein, is not under the evidence material and does not touch the question presented.

The following plat will give a clearer idea than we have presented to the court of the situation as to the facts.

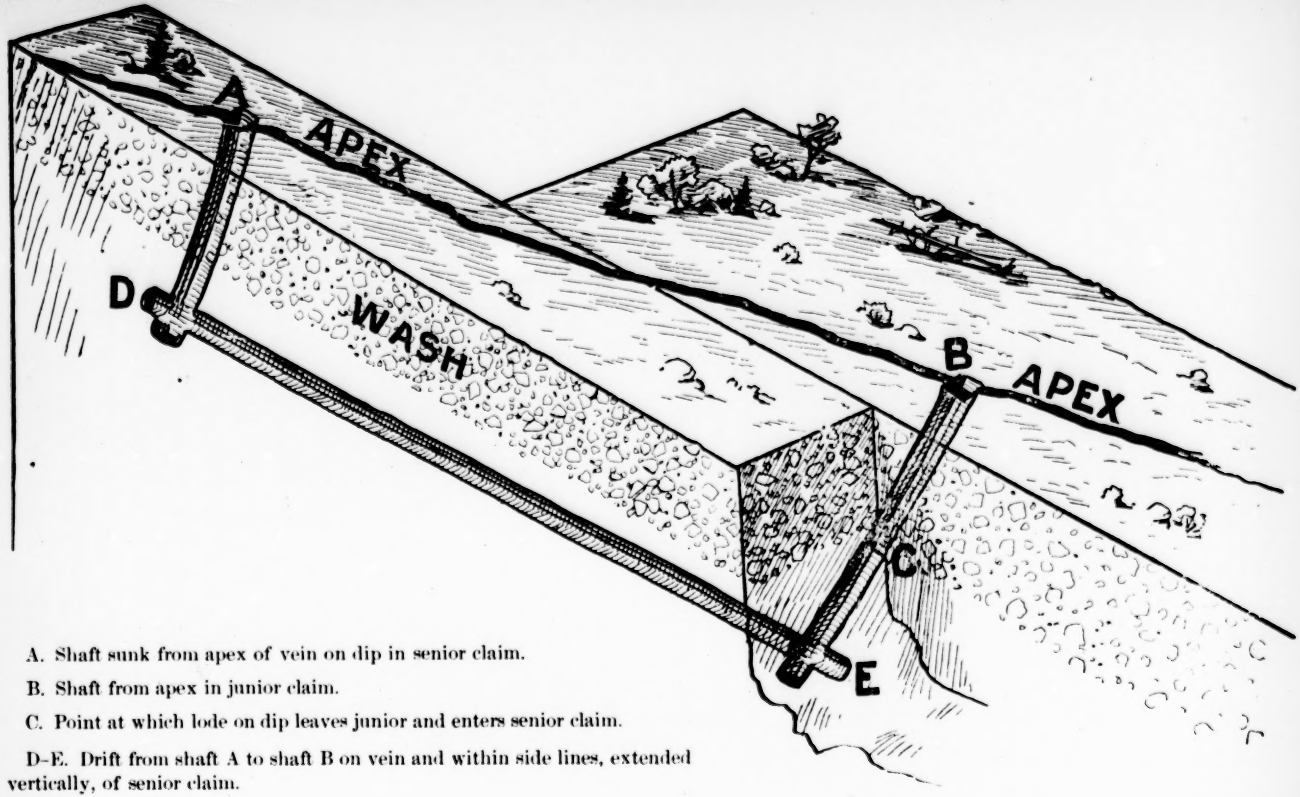
(See plate marked p. 131.)

132 Now if it be true, as held in the case of Van Zandt *v.* Argentine Co., 2 McCrary, 160:

"Ordinarily the owner of a mining claim in which is found the top or apex of a lode may follow the vein within or without his side lines on its 'dip' to any depth, yet if the same vein has been previously discovered and located on the 'dip,' such discovery will prevail against a junior discovery, though located on the apex of the vein."

Which case was affirmed in 122 U. S., 478—then we have substantially the same state of facts, making that case specific authority to this one.

The same vein, having its apex partly in the "Aliunde," that is, beyond the point where it crosses the line of the "Colorado Central," and partly within the "Colorado Central," and both claims being located upon the apex of the same vein, then the "Colorado Central," being prior in point of discovery, location and patent, all that portion of the vein lying within the surface boundaries of the



A. Shaft sunk from apex of vein on dip in senior claim.

B. Shaft from apex in junior claim.

C. Point at which lode on dip leaves junior and enters senior claim.

D–E. Drift from shaft A to shaft B on vein and within side lines, extended vertically, of senior claim.

"Colorado Central," including therein the part which has, if plaintiff's claim is correct, its apex in the "Aliunde" was so appropriated by such discovery, location and patent of the "Colorado Central" and thereby withdrawn from the public domain, that the latter location of the "Aliunde" took only that portion of the vein not thus theretofore appropriated, wherefore the plaintiff would have no right to that part of the vein lying within the surface boundaries extended downward vertically of the "Colorado Central," it being the older location. With this explanation and with this plat added to the argument made in our brief, and at the oral discussion, we think we make clear our point, and that the court has not passed upon it or considered it as it actually appeared, and as the question upon the evidence was presented to the court, by the request to charge as follows:

"The court instructs the jury that if they find from the evidence that the territory in dispute, and which the plaintiff seeks to recover, lies within the surface boundaries extended downward vertically of mining claims belonging to the defendant, and that said mining claims so belonging to defendant were discovered, lo-
133 cated and patented prior to the discovery, location and patenting of the claims by means of ownership of which the plaintiff asserts his right to the territory in dispute, then their verdict must be for defendant as to such portion of the ground in dispute as lies within said older locations of the defendant.

Or to No. 13. The court instructs the jury that if they should find from the evidence that the defendant's claim, the "Colorado Central," is located upon the same lode upon which the plaintiff claims his "Aliunde No. 2 Lode mining claim," then, since it is admitted that the "Colorado Central mining claim" is the older location and was patented before the discovery claimed to have been made by the plaintiff of the "Aliunde No. 2," the verdict of the jury must be for the defendant.

We believe that, with the plats and model before the court, we could now make plain, having the court's expression on the subject, the strength of our position, which seems not to have been made clear to the court by previous discussion, and, therefore, as we understand it, not passed upon by the court in the opinion rendered.

CHAS. J. HUGHES,
R. S. MORRISON,
Attorneys for Plaintiff in Error.

We, the undersigned counsel for plaintiff in error, "The Colorado Central Consolidated Mining Company," certify that in our judgment and opinion the foregoing petition for rehearing is well founded, and that the points therein are well taken, and that the same is presented in good faith, and in order that there may be a full discussion of the points therein specified and not for the purpose of delay.

____ ____,
Attorneys of Record in the said Court.

134 D.

Opinion Denying Rehearing.

United States Circuit Court of Appeals, Eighth Circuit.

No. 42. December Term, A. D. 1892.

THE COLORADO CENTRAL CONSOLIDATED MINING COMPANY, Plaintiff in Error, *vs.* JOHN TURCK, Defendant in Error.	In Error to the Circuit Court of the United States for the District of Colorado.

Mr. Charles J. Hughes, Jr., and Mr. R. S. Morrison, for plaintiff in error.

Mr. Willard Teller, for defendant in error.

Before Caldwell, circuit judge, and Shiras and Thayer, district judges.

On petition for a rehearing.

THAYER, district judge, delivered the opinion of the court:

The contention of counsel that the trial court awarded the defendant in error fifteen feet more territory than he was entitled to under admissions contained in the pleadings—rests wholly upon the assumption that the record before us shows the exact location of the Harris shaft with reference to the point fixed by the lower court as the place where the apex of the Colorado Central lode crosses into the Aliunde claim. We have made a careful examination of the printed record and we are unable to find any testimony which would enable us to say that the point of departure of the lode, as fixed by the trial court, is less than one hundred and fifty feet southwestwardly from the Harris shaft. On the argument of the case in this court a map was produced, for the purpose of illustration as we understand, which purports to be drawn on a given scale. By reference thereto and assuming it to be in all respects accurate, we might perhaps ascertain the approximate distance from the Harris shaft southwestwardly to the point of departure in question. But there is nothing to identify the map as a part of the record evidence in the case, even if we felt justified in relying upon computations of distances which we might make with the aid of such map.

135 With their superior knowledge of the testimony produced in the trial court (much of which has not been incorporated into the printed record) counsel may be able to say with great confidence that the Harris shaft is only one hundred and thirty-five feet to the northeast of the point fixed by the trial court as the place where the Colorado Central lode crosses into the Aliunde claim, but such fact is not apparent from the record lodged in this court.

Furthermore, we do not think that the plaintiff in error is in a position to urge successfully in this court, that the verdict and judgment are excessive in the respect claimed in the petition for a

rehearing. In the course of its charge the trial court used the following language:

"And now with reference to the territory claimed by plaintiff, of course it is only in so far as he holds the top and outcrop of the lode, or of that which he claims as exhibited in his own works and extended down from the Aliundi workings to the lowest levels. You must be of that opinion in order to find for him that he has this top and apex distinctly in his territory and the extent of it towards the eastward is a question for your consideration. Formerly it was made quite a point, the place where it comes into the location of the Aliundi, No. 2; that is to say, the witnesses were given their opinion making some estimates and calculations as to the exact place in which it came. In this trial we have not had anything of that; the extent to which the plaintiff claims is, I believe, 600 feet from the west end of the Colorado Central location; going eastward along the line of the two locations 600 feet, which is not far from the Johnson upraise—perhaps a little east of that upraise.

That is correct?

Mr. TELLER: East, your honor.

The COURT: I do not see that the parties have drawn this question much in issue in this trial, and apparently they submit that you shall determine the case upon the point which they have contested whether this which the plaintiff has in his territory is the top and apex of a distinct lode or for only part of the general top and apex of a broad lode extended far beyond that to the north."

It appears, therefore, that the jury were advised in substance that the exact point where the Colorado Central vein or lode crossed into the Aliundi claim, had not been treated as a material point then in controversy; that both parties had apparently consented or agreed that in lieu of fixing the exact point of departure of the vein claimed by the defendant in error, the jury should rather consider and determine the more important question whether the whole space between the porphyry walls was not in fact so broken up and permeated throughout with vein matter as to constitute it a single lode, with its apex lying partly within the limits of both claims. No exception was taken to this portion of the charge, nor is it embraced in either of the assignments of error. The jury must have understood what was thus said by the court as a direction to find in favor of the defendant in error to the full extent, or substantially to the full extent claimed in the complaint, if they found in his favor on the other more important issue as to the width of the lode, which the parties had apparently made the vital issue on which the verdict should depend.

We think therefore that the plaintiff in error is in no posi-
136 tion to attack the verdict or judgment on the ground that they are excessive, even though it be true that the defendant in error has recovered a few feet more or less along the lode than his proof of an apex would seem to warrant. A timely exception should have been taken to the charge of the trial court if it erred in assuming that there was no material controversy between the parties as to the extent of the recovery. Neither are we able to attach

much importance to the suggestion of counsel that the judgment should have been reversed because the jury failed to fix the depth beneath the surface at which the alleged Aliunde vein passes underneath the side lines of the Colorado Central claim. According to the view entertained by this court, that is a question which will only become material, if at all, when there shall be an accounting between the parties as to the amount of ore extracted from the alleged vein. The suit at bar is an action to recover a mining lode on the ground that the lode has its true apex or outcrop within the Aliunde side lines. Whether in its descent the lode passes outside of those side lines at a depth "of about three hundred feet beneath the surface," as alleged in the complaint, or at a depth of only one hundred and fifty feet, as the evidence tended to show—is in our opinion a question which the trial court was under no obligation to submit to the determination of the jury. The question of ownership and right of possession, which was the sole question before the jury, depended upon the location and width of the apex of the alleged vein, and in no sense upon the depth at which it passed underneath the Colorado Central side lines. Although it is alleged in the complaint that the lode sued for has a pitch of about sixty degrees to the northwest and at a depth of about three hundred feet beneath the surface enters the Colorado Central claim, yet we do not regard these allegations as so far material that they must be proven precisely as laid. Whether in an accounting suit to be hereafter brought the defendant in error will be estopped by this allegation, and by the verdict and judgment, from claiming any ores which lie at a depth of less than three hundred feet below the surface, is a question which we do not care to discuss at this time. It is sufficient to say at present, that the plaintiff in error was not prejudiced so far as we can see by the failure of the jury to fix the exact depth beneath the surface at which the vein in controversy enters its territory. We are furthermore asked to grant a rehearing with respect to the question whether the jury was not entitled to determine as to the existence or non-existence of independent veins which in their descent became united within the side lines of the Colorado Central claim. In support of this request the petition for a rehearing calls to our attention and quotes certain testimony, which unfortunately is not found in the printed record on which the case was submitted. Counsel have apparently overlooked the fact that in making up the record for this court, some of the testimony produced in the lower court was by agreement suppressed or merely summarized. With reference to the contention that the trial court improperly withdrew the last-mentioned issue from the consideration of the jury, we deem it sufficient to say that the point was considered at some length in our previous decision, and on further reflection we find no occasion for receding from the views then expressed. As we for-
137 merly remarked, the evidence to establish the existence of an independent vein within the side lines of the Colorado Central (if its single or broad lode theory was rejected) depended wholly on developments in the Herrick and O'Mally raises, and the shaft sunk in the Jim Hall tunnel, the precise location of which latter shaft is

not disclosed by the present record. If we concede that the thread of vein matter followed in the Herrick raise was followed practically to the slide or wash, and that the outcrop was within the side lines of the Colorado Central, and if we furthermore concede that the perpendicular raise in the O'Mally workings disclosed vein matter practically to the surface of the country rock, and was also within the Colorado Central territory, yet there was no evidence to establish the continuity or extent of the vein between these points. Not only was there no evidence to establish the continuity of the alleged vein (which fact under certain circumstances might no doubt have been established by inference), but the developments lower down, particularly in the Benny cross-cut, in our judgment demonstrated that no connection whatever existed between the two threads or seams of vein matter which had been followed to the slide in the Herrick and O'Mally raises. We must also again call attention to the fact that the seam of vein matter found in the O'Mally raise had not been followed downward below the second level to establish its connection with any of the lower workings. To these suggestions the reply is made that the evidence to establish the existence and outcrop of the vein on which the Aliunde location rests, was equally vague and unsatisfactory. We are compelled, however, to dissent from that view and for the following reasons: The apex of the Aliunde vein was established with reasonable certainty at three or four points within the limits of that claim, as counsel for the plaintiff in error fully concede. There was also considerable testimony which, in our opinion, showed the continuity and identity of the Aliunde vein, and its general direction within the side lines of the claim, between the several points where the vein had been traced to the surface of the country rock. The vein in question had also been followed downward to a great depth, and it seems to have maintained a well-defined pitch and strike throughout the several workings. We are of the opinion therefore that the finding of the jury in favor of the existence of the Aliunde vein, rests upon much more satisfactory evidence than that which was offered and relied upon to establish the existence of a similar vein with an outcrop within the territory of the Colorado Central. The defendant company undoubtedly did much to discredit its contention that the developments in the Herrick and O'Mally raises were sufficient to establish the existence of a continuous and well-defined vein between those points, which had its apex within the side lines of the Colorado Central claim, by its persistent contention throughout the trial that there were no well-defined separate veins between the two porphyry walls, because the whole intervening space between those walls had been broken up and was in fact a single lode having a single broad outcrop or apex. But be this as it may, we think that upon the state of facts disclosed by the present record, together with all the legitimate inferences that might be drawn there-
138 from, the jury would not have been warranted in finding that the defendant company held the apex of an independent vein which in its descent united with and became an integral part of the Aliunde vein. We are of the opinion that a finding of that nature

based upon the evidence which is before this court, would have rested upon no substantial foundation and could not have been sustained. The trial court committed no error therefore in withholding that issue from the jury. Marshall *v.* Hubbard, 117 U. S., 415, 419, and citations. Finally, we must correct the false impression which counsel seem to entertain, that we have misconceived or failed to consider the question intended to be presented by the twelfth and thirteenth instructions.

We fully understood counsel to contend that the Colorado Central Company, by virtue of its prior location, could lawfully lay claim to all ores within its side lines and end lines, which formed a part of the lode on which its location rested, even though the apex of such lode in the course of its strike to the southwest had eventually crossed into the Aliunde territory and had been there discovered and located upon by the proprietor of the latter claim. We intended to overrule that contention and we think we did do so with sufficient certainty in our previous decision. It is true that we made some reference to the vein having "forked as it entered the disputed territory," but in using that expression we merely referred to a theory which was stated in the original brief filed by counsel for the plaintiff in error. In so far as the application of the rule of law which we announced is concerned, it is obviously immaterial whether the lode became divided as it entered the disputed territory or did not so divide. In either event we think it follows, that as the Colorado Central claim had been laid rather obliquely to the general course of the outcrop, the owners of that claim lost the vein when they lost the outcrop. This view was distinctly enunciated in our previous decision, the authorities were cited on which we predicated our opinion, and we find nothing in the petition for a rehearing which is calculated to change our views. In conclusion, it may not be out of place to remark that the question whether a locator on the dip of a vein may be ousted by a subsequent locator on the apex, assuming both claims to be laid side by side and "along the vein or lode," does not seem to be presented by the record now before us, and we have expressed no opinion on that point. It follows from what has been said that no sufficient cause has been shown for further argument and the petition for a rehearing is accordingly denied.

Filed February 6, 1893.

139 (E.)

Petition for Writ of Error.

Hon. David Josiah Brewer, associate justice Supreme Court of the United States.

SIR: We hand you herewith certified copy of the transcript of record of the United States circuit court of appeals for the eighth district, October term, 1891, entitled in the case of The Colorado Central Consolidated Mining Company, plaintiff in error, *vs.* John Turck, defendant in error, and a bond which we desire to have operate as a supersedeas bond.

By such transcript it appears that the final judgment was rendered May 9, 1892, affirming a judgment against the petitioner of the circuit court of the United States, eighth circuit (district of Colorado), between the parties above named, and that a petition for rehearing was heard, considered, and determined in the same case on February 6th, 1893, denying a rehearing of the said writ of error.

It appears from this record that, although the plaintiff and defendants are citizens of different States, and it is so averred therein, that the jurisdiction of the court is not dependent entirely upon such diversity of citizenship, but, on the contrary, that the main question in controversy between the parties herein arises under and involves the interpretation of, as applied to the facts in the case, *of* the Federal statutes, viz., the construction of section 2322 of the Revised Statutes of the United States concerning the grant of the right to follow the vein, under patents of the United States, underneath the side lines of adjoining claims, and the original and real and substantial controversy between the parties was and is the construction of such statute and of conflicting patents granted under the mining laws of the United States. The petitioner further shows that the plaintiff and defendant are respectively owners of contiguous mining claims under such patent laws, the plaintiff in error being the possessor of the older patent; that the action is one of ejectment to oust plaintiff in error from the possession of lands underlying the ground of the plaintiff in error and outside of the side lines of the defendant in error, on the ground that the apex of the vein is in defendant's in error ground and not on the ground of plaintiff in error, which contention was denied by the plaintiff in error and much evidence submitted thereon.

The petitioner further shows that in refusing to charge the jury as requested by the attorneys for the plaintiff in error the judge at the circuit committed manifest and material errors, and it is further claimed that he misdirected the jury upon the interpretation, meaning, and bearings of the Federal statutes involved and upon questions of fact relating to the controversy, and, in answer to an inquiry of the jury, he, in the absence of counsel, charged the
140 jury, and that such additional and supplemental charge contained errors of law in the construction of such Federal statute and erroneous statements of fact; all of which was duly excepted to.

And your petitioner respectfully refers to the various exceptions set forth in the record by their assignment of errors, pages 99 to 104; and your petitioner further alleges and avers that the circuit court of appeals erred in not overruling the judgment of the court below and granting a new trial and in affirming the judgment of the court below and disregarding the exceptions and assignments of error of the plaintiff in error, severally and collectively, each one of which was well taken and should have entitled plaintiff in error to a reversal of the said judgment and to a new trial. The amount involved in the controversy exceeded in value the sum of five thousand dollars and is not a case arising under the patent, revenue, or the criminal law nor a case in admiralty.

Your petitioner therefore prays that a writ of error be issued, under the seal of the Supreme Court of the United States, to the United States circuit court of appeals of the eighth district, October term, 1891, to send the record and the proceedings in the above-entitled cause, with all the papers concerning the same, to the Supreme Court of the United States, so that the said Supreme Court may cause such further and other things to be done therein as it may direct to correct whatever errors may have been committed by the said circuit court of appeals and the said circuit court according to the law and custom of the United States, and that the said bond herewith submitted be approved, and that such writ shall operate as a supersedeas.

C. J. HUGHES,
R. S. MORRISON,
SIMON STERNE,
Attorneys for Plaintiff in Error.

Washington, D. C., March 24, 1893.

141 "F."

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the eighth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals, before you or some of you, between The Colorado Central Consolidated Mining Company, plaintiff in error, and John Turck, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of Sup. Ct. U. S.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 25th day of March, in the year of our Lord one thousand eight hundred and ninety-three.

(Signed) JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
(Signed) DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

142 "G."

Assignment of Errors.

UNITED STATES OF AMERICA, *ss:*

In the Supreme Court.

THE COLORADO CENTRAL CONSOLIDATED MINING COMPANY, Plaintiff in Error, *vs.* JOHN TURCK, Defendant in Error.	Error to the Circuit Court of Appeals, Eighth District.

Comes now the plaintiff in error, The Colorado Central Consolidated Mining Company, by Simon Sterne, Charles J. Hughes, and R. S. Morrison, its attorneys, and says that there is manifest error in the record and proceedings in said cause, to wit:

1. The said court erred in affirming the judgment of the circuit court of the United States, district of Colorado.

2. The circuit court of appeals erred in its interpretation and construction of the meaning and terms of section 2322 of the Revised Statutes of the United States.

3. The said court erred in holding that the defendant in error could follow and was entitled to recover his lode granted to him by a junior patent underneath the side lines and into the ground of a senior patent issued prior to the date of the original discovery or location of the lode held by the defendant in error under such junior patent.

4. The said court erred in holding that the vein, the top or apex of which was within its patent lines at the point of discovery, could not be held by the patentee at any point beyond the point where the apex of such vein left the side line, although the body of the vein remained upon its dip within and underneath the side lines of the patent.

5. The court erred in its holding and decision that the circuit court had the power and rightfully exercised the power to direct a general verdict in a case where it was conceded that the plaintiff was not entitled to recover all the ground sued for, and that the judgment for a less amount of ground, the exact amount being fixed by the court and not by the jury, should abide and stand.

6. The circuit court of appeals erred in holding that the circuit court rightfully instructed the jury, after their retirement and request for further instructions, in the absence of counsel.

7. The circuit court of appeals erred in affirming the judgment for fifteen feet of the Aliunde vein, conceded, on the face of
143 the record and by the proper construction of the record, to belong to defendant, the plaintiff in error.

8. The said court erred in sustaining the charge of the circuit court "that if there was an apex found in the Herrick raise it could

not avail to the defendant as an apex within the meaning of the law."

9. The circuit court of appeals erred in sustaining the refusal of the circuit court to charge as requested: "The court instructs the jury that the plaintiff, John Turck, as the proprietor of the Aliunde Tunnel No. 2 lode, holding a patent therefor based on a discovery made after the final patenting of the Colorado Central lode, has no right, as such proprietor, to recover his lode underneath the Colorado Central lines."

10. The circuit court of appeals erred in sustaining the refusal of the circuit court to charge as requested: "The court instructs the jury that the plaintiff, John Turck, as the proprietor of the Aliunde Tunnel No. 2 lode, holding a patent therefor based on a discovery made after the final patenting of the Colorado Central lode, has no right, as such proprietor, to recover his lode underneath the Colorado Central lines of the Aliunde lode, the jury believe from the evidence to be a part of the same lode as that on which the Colorado Central patent issued."

11. The circuit court of appeals erred in sustaining the refusal of the circuit court to charge as requested: "The court instructs the jury that the proprietor of a lode which comes on its dip within the side lines of another lode has no right to recover in this action such lode, although he may have the right to penetrate underneath the side lines of another lode and extract ore."

12. The circuit court of appeals erred in sustaining the refusal of the circuit court to charge as requested: "The court instructs the jury that it appears from the evidence that the Colorado Central lode was entered and the patent finally issued before the first step in the patenting of the Aliunde claim—that is to say, before the discovery of the Aliunde claim—and that, as said lode has been worked west, under the testimony it either follows the apex or if it loses the apex it still returns underneath its side lines a portion of the lode—that is to say, so much of the lode that dips underneath—and, the said Colorado Central having been patented on a discovery made on its apex before the first step in the initiation of title to the Aliunde lode, the Colorado Central owners have the right to hold such portion as they inclose within their side lines extended vertically downward as against a claim of a subsequent location on the said vein, although such vein penetrated underneath the Colorado Central side lines."

13. The circuit court of appeals erred in sustaining the refusal of the circuit court to charge as requested: "The court instructs
144 the jury that if they believe from the evidence that the plaintiff has a vein whose apex is within his own ground, and the defendant also an apex within his ground, and two lodes shown on said apex, if there be two lodes come together in their downward course, that the defendant is entitled to the entire vein below the point of union."

14. The circuit court of appeals erred in sustaining the refusal of the circuit court to charge as requested: "The court instructs the jury that if the defendant has proved up from its lower workings,

where it is conceded that it has made certain raises and has followed those raises up on a streak or seam of crevice material containing mineral, that such streak or seam (if the jury believes there are several lodes between the porphyry dykes) constitutes a lode within the meaning of the law, and it makes no difference whether it carries more or less mineral than the seam on which plaintiff may have sunk or whether it would pay to work."

15. The circuit court of appeals erred in sustaining the refusal of the circuit court to charge as requested: "The court instructs the jury that if they find that in the raise alleged to be carried to the surface in the Herrick raise, in the O'Malley raise, or in the shaft of the Jim Hall tunnel there is a streak or seam of mineral constituting a lode under these instructions that it makes no difference that such seam or streak is called by plaintiff's witnesses a spur or any other derogatory term."

16. The circuit court of appeals erred in sustaining the refusal of the circuit court to charge as requested: "The court instructs the jury that a spur is a small streak or seam of crevice material or mineral, or both, going off into the country or adjoining rock, but that if such seam, as continuity ore, contains mineral that will show an assay of an ounce or more or mineral apparent to the eye, such as miners would follow, it constitutes a vein or lode within the meaning of the law, notwithstanding the fact that witnesses may designate it as a spur or feeder or by some other derogatory term."

17. The circuit court of appeals erred in sustaining the refusal of the circuit court to charge as requested: "The court instructs the jury that if they find for the plaintiff they must designate at what point east and west his claim, which he calls the north vein, forms a junction with any vein claimed by defendant; must define the boundaries east and west in the plane of union with such certainty that a writ of possession may issue accordingly; and if they find that the plaintiff has a separate vein apexing within his ground or a certain number of feet going east and west they must also find where it unites with another vein of the defendant which has an apex within defendant's ground, and if such be the case that the vein- so unite they can find for the plaintiff only for the ground above the plane of junction."

145 18. The circuit court of appeals erred in sustaining the refusal of the circuit court to charge as requested: "The court instructs the jury that if they find from the evidence that the territory in dispute and which the plaintiff seeks to recover lies within the surface boundaries extended downward vertically of mining claims belonging to the defendant, and that said mining claims so belonging to defendant were discovered, located, and patented prior to the discovery, location, and patenting of the claims by means of ownership of which the plaintiff asserts his right to the territory in dispute, then their verdict must be for defendant as to such portion of the ground in dispute as lies within said older locations of the defendant."

19. The circuit court of appeals erred in sustaining the refusal of the circuit court to charge as requested: "The court instructs the

jury that if they should find from the evidence that the defendant's claim, the Colorado Central, is located upon the same lode upon which the plaintiff claims his Aliunde No. 2 Lode mining claim, then, since it is admitted that the Colorado Central mining claim is the older location and was patented before the discovery claimed to have been made by the plaintiff of the Aliunde No. 2, the verdict of the jury must be for the defendant."

20. The circuit court of appeals erred in sustaining the refusal of the circuit court to charge as requested: "The court instructs the jury that if they should find or believe that there are several separate or different veins or lodes, and that one or more of them have their outcrop within the boundaries of plaintiff's property and thence descend upon their dip into defendant's property, and also find that there exist other veins having their outcrop or apex within the boundaries of defendant's claim, and that these latter claims descend into and connect with the stopes and ores bodies claimed by the said plaintiff within the surface boundaries extended downward vertically of the defendant, then, as to such ore bodies, the verdict of the jury must be for the defendant, because their apex lies within the territory of the defendant, and to the extent the said apexes lie within the surface boundaries of the Colorado Central vein, the verdict from the point of junction, if there should be found a junction, of the vein alleged to outcrop within the plaintiff's property, thus outcropping within the Colorado Central, is the property of the defendant, because the Colorado Central is the older discovery and location."

21. The court erred in sustaining the charge of the circuit court as follows: "And again, in so far as the lode is within the location by its top and apex (the court referring to the Aliunde No. 2 lode) he (referring to the plaintiff) has the right to follow it to any depth to which it may go, although it entered land adjoining."

146 22. The court erred in sustaining the charge of the circuit court as follows: "Now, the question which is presented by the evidence here is whether in this belt or zone of country which the witnesses have described before you so fully and at such length the condition of things exhibited to you by the testimony and by these maps and models is of one kind or the other; whether in this belt of country which the witnesses have described there are several lodes or veins, or whether it shall all be taken to be one.

"Counsel for defendant insists that between the porphyry walls which extend throughout this territory, or which it may be fair to assume extend throughout the country in greater or less strength, the condition is that the whole country is broken up. The entire space between the two walls is broken up to such an extent and so far mineralized that it shall be taken to be one lode only. The position of the plaintiff is that in this same space there are several lodes or fissures which should be separately regarded and should be taken to be separate and distinct lodes or veins."

"There is some difficulty undoubtedly in accepting the defendant's theory in consequence of the development of a body of mineral upon the north side of the north wall of porphyry, because you can-

not well say—if there be something to the north side there of value, another body of ore, which so far as developed is quite as distinct and full in every measure as that upon the south side—you cannot well say that his north wall or zone or belt of porphyry is a wall of a lode, and if you do not accept that as a wall then where shall the wall be fixed on the north side of that—where shall we say that it is?"

"But I do not want to enter into the discussion of the testimony. The counsel have done that, and I do not even wish to express an opinion to you upon it. I wish to bring before your minds clearly the question whether this region in which the several bodies of ore are found was so broken up by whatever force was at the openings which undoubtedly exist in these rocks—was broken up and afterwards mineralized by the agencies which were at work there as to constitute one vein or lode, or whether the rents and fissures which it is said have been followed in various workings, the stopes, levels, and drifts—whether they are of a separate and distinct character. That is clearly a question for a jury and, as it seems to me, upon its determination your finding should be made almost entirely. That is the principal question for your consideration, although, as I shall presently mention, there may be something more."

23. The court erred in sustaining the charge of the circuit court as follows: "As connected with that question, maintaining, as defendant does, the proposition in all its testimony and in argument, that the whole *space* comprehended in all the workings is to
147 be taken only as one lode, it nevertheless seeks to maintain before you that if plaintiff's view be accepted by you, and that defendant has what may be regarded as a north vein coming to the surface somewhere near the north side line of the Colorado Central location, or north of that, it may claim all below the point of union between the veins under such an outcrop as that. I do not think that can be a question for your consideration. The defendant making the issue that the lode is one; that the entire space covered by the working is but one lode; that a broad outcrop, top, or apex extends from somewhere in the Aliunde No. 2 ground northward through and across the Colorado Central ground, is not at liberty to change the issue by saying that there are several veins and asking you to find on that hypothesis that there is an outcrop under which it may claim from the junction of the two and below that."

24. The court erred in sustaining the charge of the circuit court as follows: "But if that were not true, there is no evidence before the jury upon which we can locate that outcrop to any considerable extent—that is to say, if there is an outcrop, top, or apex shown in the Herrick raise and in the O'Malley raise and in the shaft which comes down from the Jim Hall tunnel we are unable to say whether that falls within the Colorado Central location to any considerable extent. The Aliunde patent is senior to the Colorado Central Extension patent and to the other patent which was mentioned as belonging to the Nolan and Gilmer parties, or at least it is senior so far as the issues in this case are concerned. If the defendant, relying upon

that, intended to put itself upon the ground that there are several veins in this territory, and that it is entitled to hold the northernmost one and all below the point of junction under its location, it would be incumbent upon it to show the location or the top and apex throughout the territory in controversy, so that it may seem whether it is senior or junior to the plaintiff's patent."

25. The court erred in sustaining the charge of the circuit court given in absence of counsel as follows: "That is to say, the jury asked the court whether or not, if they were satisfied from the evidence that there was an apex of a lode disclosed in the Herrick raise—whether the proof of such lode in such raise would justify a finding for defendant; to which interrogatory of the jury the court answered that such fact could not avail to the defendant as proof of an apex within the meaning of the law, unless the jury should be of the opinion that the lode is of the width claimed by defendant. Evidence of such apex is of no weight except as affecting the width of the lode at the surface. If the jury should believe the lode to be as claimed by defendant, and this to be a part of the general outcrop, it might be sufficient to sustain defendant's view of the case."

148 26. The circuit court erred in refusing to sustain any of the exceptions taken by the plaintiff in error in the court below and in refusing to reverse the judgment and order a new trial.

SIMON STERNE,
C. J. HUGHES,
R. S. MORRISON,
Att'ys for Plaintiff in Error.

Endorsed on cover: Case No. 15,319. U. S. Supreme Court, October term, 1893. Term No., 935. The Colorado Central Consolidated Mining Company, plaintiff in error, *vs.* John Turck. Agreed record. Filed September 6th, 1893.

935

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IN

The Supreme Court

OF THE

United States.

OCTOBER TERM, 1893.

THE COLORADO CENTRAL CONSOLIDATED MINING COMPANY,
Plaintiff in Error,
vs.
JOHN TURCK,
Defendant in Error.

Writ of Error to United States Circuit Court of Appeals, 8th Circuit.

Brief of Defendant in Error on motion to dismiss Writ and dismiss Supersedeas, united with motion to affirm judgment.

WILLARD TELLER,
H. M. ORAHOOD,
Attorneys for Defendant in Error.

C. J. KELLY, PRINTER, DENVER.

IN

The Supreme Court

OF THE

United States.

THE COLORADO CENTRAL CONSOLIDATED MINING COMPANY,
Plaintiff in Error,
vs.
JOHN TURCK,
Defendant in Error.

Statement of facts shown by the record, and Brief on motion to dismiss writ of error to the United States Circuit Court of Appeals, joined with a motion to affirm judgment.

I.

A brief statement of the facts will not be out of place. The suit was originally brought on the second day of December, 1885, by John Turck, a citizen of Colorado, against the plaintiff in error,

a corporation organized under the laws of the State of New York. No grounds of jurisdiction other than that of citizenship was ever suggested in the pleadings on either side. The action was in ejectment for a lode claim, the plaintiff Turck setting up ownership of a lode by patent, the lode having its apex within the surface lines of his patent, and descending into the territory adjoining his lode on the north, on its dip, and passing outside of his side lines into that of the defendant on the dip. The plaintiff claimed by virtue of his patent, and by virtue of the right reserved to him in the patent of the plaintiff in error, as given by Sec. 2322, U. S. Statutes. The defendant answered, First, A general and special denial; and, Second, What is called a "second defense," setting up ownership to the Colorado Central lode since 1870, and that it had been patented to it on that date, and long before the date of discovery or patent of the Aliunde lode No. 2, the latter being Turck's lode. And, by paragraph No. 3, setting forth that the Colorado Central lode lay north of and adjoining the patented ground of the Aliunde, and that the vein worked by the defendant was the vein of the Colorado Central, or some vein having its apex within the side lines of the Colorado Central survey, and not within the Aliunde. And, by the fourth paragraph, it denied that it wrongfully withheld possession from plaintiff of the Aliunde lode, or any vein having its apex within the side lines of the Aliunde. To this second defense Turck replied, denying the defendant's ownership in the Colorado Central lode to the extent averred; *admitting the second paragraph of the answer that the*

Colorado Central lode was patented before discovery and patent of the Aliunde; admitting that the two lodes lay adjoining each other, but denying that the Aliunde lode was a part of the Colorado Central lode, and denying that the vein of the plaintiff had its top or apex within the side lines of the Colorado Central lode, at any point claimed by the plaintiff; and, fourth, denying that defendant had not wrongfully withheld, etc., possession of the Aliunde lode.

On these issues thus made, the case went to trial, in November, 1890, and a verdict was rendered for the plaintiff, and a judgment for restitution of the lode property described entered upon the verdict, which, upon the payment of costs under the statutes of Colorado, was set aside, and another trial had on the 18th day of May, 1891, resulting in a verdict and judgment for the recovery of the property described in the complaint, no evidence of any kind being offered by either party on the question of damages, the statutes of Colorado allowing the party to seek his damages in a suit of ejectment, or after judgment, as he shall elect. The case was taken by a writ of error to the United States Circuit Court of Appeals, and the judgment there affirmed, May 8, 1892 (see 50th Fed. Rep., p. 888). A petition for rehearing was filed during the term, which was denied in February, 1893 (see 54 Fed. Rep., p. 262), and the plaintiff in error petitioned the Court for a writ of error to the U. S. Circuit Court of Appeals, which was allowed by Justice Brewer in March, 1893. At the second trial, the defendant in that Court (plaintiff in error here) presented to the Court four instructions, which may be found on page....of the printed record, in Court of Appeals,

and numbered 1, 2, 3 and 4, none of which appear in the record, except in the assignment of errors, all of which raised but one question, and that question is the right of the owner of a lode by patent to follow the dip of his lode, the apex of his lode being within the side lines of his patent, into the grounds of another party, held also by patent, the patent of the latter being of an earlier date than that of discovery or patent of the former; and the refusal to give these instructions is the sole ground upon which plaintiff in error invokes the jurisdiction of the Court, it being alleged that the jurisdiction of the Court below did not depend upon citizenship of parties only, but upon the necessity for the construction of Section 2322, Laws of the United States, and hence that jurisdiction of the Circuit Court of Appeals was not final; that this Court has jurisdiction of this case to review the decision of the Court of Appeals, and the motion is to dismiss the writ for want of jurisdiction in this Court until united with a motion to affirm the judgment under Rule 6 of this Court.

First—Because the judgment of the Circuit Court of Appeals is final.

BRIEF.

The appellate jurisdiction of this Court extends, by Article III, Sections 1 and 2, Constitution of United States, to cases mentioned in first section, other than those specified in the second section, to both questions of "law and fact, with such exceptions and under such regulations as the Congress shall make." The appellate jurisdiction of this Court, as well as the rules of law governing the

determination of the question of jurisdiction under the Constitution and the laws was, prior to March 3, 1891, well settled by numerous decisions of the Courts. By these decisions it was settled that its appellate jurisdiction was confined to and could be exercised only when exercised in pursuance of positive statutes fairly within constitutional grants.

Wiscat vs. Dauchy, 3 Dall., 321.

"If Congress has provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction, and if the rule is provided we cannot depart from it. The question, therefore, on the constitutional point of an appellate jurisdiction is simply whether Congress has established any rule regulating its exercise."

"The affirmative description of the appellate power of the Supreme Court contained in the judiciary act implies a negative on the exercise of such appellate power as is not comprehended within it."

Ex parte McCandle, 7 Wall, 506.
The Francis Wright, 105 U. S., 381, 385.
Tennessee vs. Davis, 100 U. S., 290.
Nat. Bank of B. vs. Peters, 144 U. S., 570, 571.

Second—The Statute of March 3, 1891, (26 U. S. Stat., 286) providing for the creation of the U. S. Circuit Court of Appeals, Sec. 4, provides that review by writ of error or appeal from existing Circuit Courts shall be had only in the Supreme Court, or in the Circuit Court of Appeals hereby established according to the provision of this act regulating the same. Section 5 provided that in certain enumerated cases appeals or writs of error might be taken direct to this Court, which enumer-

ation does not cover the case at bar. Then by joint resolution (26 U. S. Stat., 1115), the appellate jurisdiction of this Court and the Circuit Court of Appeals was retained as to cases then pending before it, and in cases where writs of error were sued out before July 1, 1891. The case at bar does not come within that resolution, since the writ of error was not sued out until September, 1891. This leaves Sec. 6 of said Act the only law, rule or regulation of Congress under which writ of error could be had. By this Section, "Judgments of the Circuit Court of Appeals shall be final in all cases in which the jurisdiction is *dependent entirely* upon the opposite party to the suit or controversy being aliens, and citizens of the United States, or citizens of different States." Further on in the same Section it is provided that, "In all cases not hereinbefore in this Section made final, there shall be of right in appeal or writ of error or review of the case by the Supreme Court of the United States, when the matter in controversy shall exceed one thousand dollars besides costs."

This Court has already had occasion to pass upon this Section, and in

McLish vs. Roff, 141 U. S., 665,

it declared that, "From the very foundation of our judicial system, the object and policy of the acts of Congress in relation to appeals and writs of error * * * have been to save the expense and delays of repeated appeals in the same suit, and to have the whole case and every matter in controversy in it decided in a single appeal. * * * It is a matter of public history, and is manifest on the face of that act that its primary object was to facilitate the prompt disposition of cases in the Supreme Court, and to relieve it of the enormous burden of suits

resulting from rapid growth of the country and from the steady increase of its litigation. * * *

"It then provides for the distribution of the entire appellate jurisdiction of our national judicial system between the Supreme Court of the United States and the Circuit Court of Appeals by designating the classes of cases in respect to which each of those two Courts shall respectively have final jurisdiction."

Section 4 of the act provides that appeals, etc., shall be had from Circuit Courts, and subject to review only in Supreme Court or in the Circuit Court of Appeals, according to the provisions of that act, hence all reviews in Circuit Court of Appeals or Supreme Court must be had according to the provisions of that act.

Now, in view of the object and end of the statutes in question and of the holding of the Court, we invoke the well known rule of a strict construction in order to make this remedial statute effective, and we call attention to the fact that there is no evidence whatever of the value of the property in question, the allegations of damage to the amount of $250,000 not relating to the value of the lode property sought to be secured, and upon those allegations no evidence whatever was offered or received. Even in a case for recovery of money the *ad damnum* does not govern.

> Hilton vs. Dickinson, 108 U. S., pp. 165, 176.
>
> Elgin vs. Marshall, 106 U. S., p. 578, and cases cited.

The statute gives right of review only where the matter in controversy exceeds $1,000 and costs.

True it is that under the practice of this Court,

on question as to amount necessary to give jurisdiction in cases of writs of error from Circuit Courts, affidavits are received to make up the record so as to show an amount sufficient for the Court to take jurisdiction. But in that case, the writ of error is not allowed to operate as a supersedeas.

Williamson vs. Kincaid, 4 Dallas, p. 20.
Course vs. Stead, 4 Dallas, 22.
Elgin vs. Marshall, 106 U. S., 578.

Hence the supersedeas in this case must be dismissed in any event.

Third—By the rule laid down, in

Wiscat vs. Dauchy, 3 Dall., 321,

and expressly affirmed in

Durossean vs. U. S., 6 Cranch, 307, and
Murdoch vs. City of Memphis, 20 Wall, 620.
Tenn. vs. Davis, 100 U. S., 290, and in
The Francis Wright, 105 U. S., 385,

it is said "the appellate jurisdiction of this Court is 'qualified in as much as it is given with such exceptions, and under such regulations as the Congress shall make.' If Congress has provided no rule to regulate proceedings, then we cannot exercise an appellate jurisdiction."

We submit that Congress has not, either in the act of March 3, 1891, or in any other act, provided any rule for taking an appeal or writ of error in a case like this. Error is usually saved by an exception. Here there are no exceptions, and the errors assigned are in substance nothing but an assertion that the Circuit Court of Appeals erred in affirming the judgment, yet there are twenty-six assignments of error filed here to twenty in

the Court of Appeals, and at least twenty out of the twenty-six are assignments upon which the Court of Appeals said nothing and decided nothing. The gist of the whole matter is found in the twenty-sixth error assigned, as follows: "The Circuit Court erred in refusing to sustain any of the exceptions taken by plaintiff in error to the Court below, and in refusing to reverse the judgment and order a new trial."

This Court has no jurisdiction in this case, unless it be found as a fact that within the language of Sec. 6 of the act under review, the decision of the Court of Appeals is *not final* because jurisdiction was not dependent entirely upon the opposite parties being aliens or citizens of different states. The jurisdiction here referred to is clearly the jurisdiction of the Circuit Court, and the Circuit Court of Appeals. The question is, was the jurisdiction of these Courts dependent entirely upon the citizenship of the parties? To invoke the jurisdiction of a Federal Court, "The facts showing the jurisdiction of the Court must *always* appear on the record in the first *instance*, or there is no jurisdiction, and there are no presumptions in favor of the jurisdiction. To this rule there are no exceptions."

Ex parte Smith, 94 U. S., 456, 457.

The presumption is that it is without the jurisdiction unless the contrary affirmatively appears.

Grace vs. Ins. Co., 109 U. S., 283.

Rovertson vs. Cease, 97 U. S., 646.

"The rule is inflexible and without exceptions, which requires this Court of its own motion to deny its own jurisdiction, and in the exercise of its appellate power, that of all other Courts of the United

States, in all cases where such jurisdiction does not affirmatively appear in the record in which in the exercise of that power it is called to act. On any writ of error or appeal, the first fundamental question is that of jurisdiction, first of this Court and then of the Court from which the record comes. This question the Court is bound to ask and answer for itself, even when not otherwise suggested and without respect to the relation of the parties to it."

Mansfield, C. C. R., vs. Swan, 111 U. S., 379, 382.

King Bridge Co. vs. Otoe Co., 120 U. S., 225.

Morris vs. Gilmer, 129 U. S., 325 6.

In the case at bar, the allegation of citizenship of plaintiff and defendant was clearly set forth and the jurisdiction attached at once and forever at the time that the suit was brought. In law, a jurisdiction derived from facts necessary to give it, and where there is no contention or dispute about what the facts are, or as to whether jurisdiction was had by reason of the facts, can never be said to *depend* on facts other than those which clearly gave jurisdiction, and whose continued existence kept and maintained such jurisdiction. Jurisdiction, once legally had and continuously retained by reason of the existence of facts, could be in no sense affected by subsequent showing of other facts which might also have given the Court jurisdiction had they been stated as the ground of jurisdiction. The jurisdiction did not in the slightest degree in this case depend upon any question of interpretation or construction of a federal statute, since the jurisdiction was full, complete and perfect from the moment

the complaint was filed setting up the citizenship of the parties and the amount involved exceeding $500, and as no question whatever has ever been raised upon the ground of citizenship, the jurisdiction depends entirely upon citizenship. To make the jurisdiction dependent upon anything else than that, it must first be held that jurisdiction on the ground of citizenship does not sufficiently appear. There is and can be no dependence on anything else than citizenship so long as the jurisdiction on that ground is beyond dispute.

Fourth—Even if this were not true, we say, there is shown in this record no other ground of jurisdiction than that of citizenship of parties. The sole and only federal question upon which plaintiff in error has ever based any error, is the question raised by instruction set forth in Nos. 1, 2, 3 and 4, assignment of error in Court of Appeals, and the only question thus raised is whether a patentee of a lode claim whose discovery and patent is later than the date of another's patent, may follow his junior patented lode into the other's patented ground on the dip, the later patentee having the apex of the lode patented within the side lines?

The attention of the Court to this question was first called by these instructions, though the facts upon which the instructions are based were set up by the defendant in its second defense, and admitted by plaintiff in the Court below in his replication to the second paragraph of this second defense. The issue thus made by answer and replication is one of law, and involved this exact question raised by the instructions, and if the contention that the Court erred in refusing the in-

struction is true, the issue should have been raised, heard and determined on that issue thus made.

Besides that, if this Court will take notice of the petition for rehearing in this case (p. 16), filed in the Court of Appeals, and a part of the record herein, it will see that upon this exact question and in regard to it, plaintiff in error, by its counsel, says: "The settlement of it requires a construction of a Federal Statute, and would, if the pleading had been so framed, have entitled either party to a determination of it by the Supreme Court; but as another ground of jurisdiction, to wit: *Diversity of citizenship, clearly existed*, and as the laws were at the time the suit was brought, and when the case was tried, the case would go to the Supreme Court, necessarily, this Federal question was not *eo nomine* made the ground of jurisdiction." From which it is clear, that even then counsel was not claiming jurisdiction as dependent on anything else than citizenship of parties.

The jurisdiction of the Circuit Court and of the Court of Appeals did not in the least depend, nor has it ever depended, nor could it depend in the least upon any question that as a Court having full and complete jurisdiction of the parties, and the subject matter, it might be called upon to decide, the decision of them being incidental to its jurisdiction to hear the case.

Fifth—But more than this, jurisdiction of the Federal Courts can never be successfully invoked on the grounds here contended for by plaintiff in error, viz.: Construction of a Federal Statute, unless the rightful decision of a case depends upon the construction thereof.

The undoubted rule of this Court on the subject is:

"That jurisdiction is not given on the ground of construction of a Federal Statute unless the decision of the case must depend upon that construction, that it must appear by the record that the suit is one which really and substantially involves a dispute as to a right which depends upon the construction or effect of the constitution or some law or treaty of the United States."

Gold W. Co. vs. Keyes, 96 U. S., 201 and 202.

So here, the jurisdiction being already had, no jurisdiction attached on ground of construction. One ground of jurisdiction is enough, and as the decision of all questions in the case was possible to a court having jurisdiction, there was no *dependence* whatever on the question of construction of any provision of any statutes except that relating to the citizenship of parties.

Sixth—No jurisdiction can be based upon the alleged necessity for the construction of a statute, because it is elementary and not to be denied, that the construction of a statute is admissable only when there is something in the statute or out of it that renders the language used open to more than one meaning. This rule has been so often announced by this as well as by all other courts, that we need cite no authorities on that point. The section of which construction is claimed is as follows:

"Sec. 2322. The locators of all mining locations heretofore made, or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs or assigns, where no adverse claim exists on the 10th day of May, 1872, so long as they comply with the laws of the

United States, and with State, territorial and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their location, and of all veins, lodes, and ledges, throughout their entire depth, the top or apex of which lies inside of such surface line extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface location. But their right of possession to such outside part of such veins or ledges shall be confined to such portions thereof as lie between vertical plains drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another."

It will be noticed that there is in this section, no reservation, limitation or exception to the right of a miner to follow his lode on its dip, he having the apex within his side lines, except the reservation or limitation of his right as between the vertical planes drawn downward through the end lines, and the reservation from entering the surface ground of another. It is scarcely possible to conceive how the right to follow on the dip the lode whose apex is within his side lines could have been given more explicitly and clearly. There is no ambiguity and no conflict in the language used, and it was as this Court has held but a reaffirmation of the rights held by miners under miner's laws and customs before the passage of the act.

Under and in pursuance of that section, the United States Land Office, ever since 1873, have been granting patents to lode claims, and both plaintiff in error and defendant in error obtained patents that in everything except description of property and names of parties are identical. Plaintiff in error got his patent in 1879, which in the granting and reserving portion, reads as follows:

"Now know ye, that the United States of America, in consideration of the premises, and in conformity with the said revised statutes of the United States, have given and granted, and by these presents do give and grant unto the said ——, his heirs, successors and assigns, the said mining premises hereinbefore described as (description of property), with the exclusive right of possession and enjoyment of all the land included within the exterior lines of said survey not herein expressly excepted from these presents, and of ..... linear feet of the said ..... vein, lode or deposit for the length hereinbefore described, throughout its entire depth, although it may enter the land adjoining, and also of all other veins, lodes, ledges or deposits throughout their entire depth, the tops or apexes of which lie inside the exterior lines of said survey, at the surface extended downwards vertically, although such veins, lodes, ledges or deposits in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said survey; *provided*, that the right of possession hereby granted to such outside parts of said veins, lodes, ledges or deposits shall be confined to such portions thereof as lie between vertical plains drawn downward through the end lines of said survey at the surface so continual in their own direction that such vertical plains will intersect such exterior parts of said veins, lodes, ledges or deposits." Then follows the restriction or limitation, "First, that the grant hereby made is restricted to the land hereinbefore described as .....linear feet of the..... vein, lode, ledge

or deposit for the length aforesaid, throughout its entire depth as aforesaid, together with all other veins, lodes, ledges or deposits, throughout their entire depths as aforesaid, the tops or apexes of which lie inside the exterior sides of said survey.

"2d. That the premises hereby conveyed, with the exception of the surface, may be entered by the proprietor of any other vein, lode, ledge or deposit the top or apex of which lies outside the exterior lines of said survey, should the same in its downward course be found to penetrate, intersect, extend into or underlie the premises herein granted, for the purpose of extracting and securing the ore from such other vein, lode, ledge or deposit."

It is thus seen that the law under which the patent was granted to the plaintiff in error, as well as the patent, in express terms grants the land to plaintiff in error subject to the right of *any proprietor of any lode whose top or apex was within his side lines* to follow his vein on its dip, and there is not a word of any kind, either in the law or the patents, that makes the right of this proprietor of a lode whose apex is within his side lines dependent, in the slightest respect, upon whether the proprietor of another lode made his discovery or got his patent before or after the completion of the other's patent.

There is no construction possible except to give the words used their plain meaning, and it is manifestly impossible for this or any other Court to change either the statute or the patent, and it must do both if it puts in the exception that plaintiff in error contends for since the Courts do not make laws, but simply administer them.

Seventh—But it is not alone by the law of 1872, and patents issued thereunder, that every miner

takes a lode claim subject to the right of any other miner to follow a lode on its dip whose top or apex is within his side lines, but by the law of 1866 and by patents issued under that law, and by the custom of miners for more than fifty years in this country, every mining claim has been subject to the right of another to follow his vein on the dip, although it entered into adjoining ground owned by another.

The law of Congress of 1866 provided that—

"When any citizen of the United States having expended in actual labor not less than $1,000 on a lode claim, there being no controversy relating to such claim, on conforming to the laws, customs and rules of miners, might apply for and receive a patent 'granting such mine together with a right to follow such vein or lode with its dips, angles and variations to any depth, although it may enter the land adjoining, which land shall be sold subject to this condition.'"

14 U. S. Statute at Large, 251.

Here, then, is the same right given by statute to one and reserved from the other and given without limitation as to dates of discovery or patent, and this law existed up to May 10, 1872.

And, again, Sec. 2322 of the Revised Statutes, enacted May 10, 1872, as well as the law of 1866, made the local laws and customs of mines, the test of the miners' rights and recognized to the fullest extent the right of both miners and of a State or Territory to make laws and regulations, "not in conflict with the laws of the United States, covering their possessory title;" and these laws thus provided for as determinative of the miner's right to a patent, and not conflicting with the laws of the United States, must govern and control the rights

claimed under the United States law. The law of the State is by this act made operative and decisive, provided only that it is not in conflict with the laws of the United States. The statutes of Colorado, from the year 1874 up to this time—General Laws of Colorado, 1883, Sec. 2405—defines the rights of a miner locating a lode thus:

"The location or location certificate of any lode claim shall be construed to include all surface grounds within the surface lines thereof, and all lodes and ledges throughout their entire depth, the top or apex of which lie inside of such lines, extended downward, vertically, with such parts of all lodes or ledges as continue by dip beyond the side lines of the claim, but shall not include any portion of such lodes or ledges beyond the end lines of the claim, or the end lines continued, whether by dip or otherwise, or beyond the side lines in any other manner than by the dip of the lode."

It is evident that this law is not in conflict with the law of the United States, and is therefore one recognized by it, and as it defines the right of the miner as to following his lode on the dip, and makes no exceptions, except to confine the dip with the claim as fixed by the end lines, it is clear that the State law is sufficient, and if this action had been brought in the State Courts *no removal* could have been had on the ground of the construction of the United States Statutes, the State Statute being in effect the same, and no writ of error to the State Court by this Court could have been had upon any decision or construction of the statute because the decision would rest upon a State Statute.

Eighth—Again, if the jurisdiction in the case does not depend entirely upon the question of

citizenship, then it must be that jurisdiction arises, because it is a case arising under the Constitution or Law of the United States under the Act of March 3, 1887, as amended August 13, 1888; and here it must be observed that this Act, unlike the prior Acts, evidently was intended to and does restrict and abridge, instead of enlarging the jurisdiction of the Federal Courts, and this is very apparent in the matter of removal of causes from the State Court.

Wolf vs. Chisolm, 30 Fed. Rep., 881.

Dwyer vs. Peshall, 32 Fed. Rep., 497.

Hence a strict construction is to be applied to that statute in furtherance of the end and object of its enactment, and as we have already noticed, the end and object of the Act of March 3, 1891, being to relieve this Court; a strict construction against repeated appeals must be given to both Acts, and especially upon the question of jurisdiction, because *it* is the creature of positive statute and is not had by mere construction; and in this view we contend that no jurisdiction arises under any law of the United States, because the record shows no decision on a United States law necessary. The language of the State law is clearly sufficient to enable the defendant in error to follow the lode on the dip, and as it was not in conflict with, but wholly consistent with the United States Statute, his rights and the rights of plaintiff in error could be determined on the State law alone. Suppose this suit had been brought in the State Court, and this same question raised as to the construction of United States Statute, and the Court had decided it, and the party against whom decision was had

had taken writ of error from the highest Court of the State, this Court would have held, as it has held in a dozen cases, that if the decision of the State Court was had upon a question of *general jurisdiction* or on a State Statute not conflicting with a Federal Statute or on any ground independent of the Federal Statute and broad enough to cover the decision, this Court would have no jurisdiction.

N. O. vs. N. O. W. Co., 142 U. S., 79.
Delaware City, etc., vs. Reybold, 142 U. S., 636.

The rule is well stated in

Klinger vs. Mo., 13 Wall, 263.
De Sassure vs. Gaillard, 127 U. S., 216.

The only questions upon which plaintiff's right to recover depended was, "had he the top or apex within his side lines, and had he a patent or location certificate, and did this lode descend by its dip into the adjoining ground?" These questions arose on the State law cited; upon this depended the right of recovery, and this right of plaintiff did not *necessarily* arise out of any Federal Statute, but upon the local law.

The right and duty of a Federal Court to administer the State laws, will not be questioned, and with the decisions of this Court, above quoted, it is clear that neither a State Court or the Federal Court in refusing to insert exceptions in the Federal Statute or in the State Statute on the same subject, did not necessarily rest its decision on the Federal Statute, the decision could as well be founded and for the purpose of this suit, must be held to have rested on the State Statute, since

there is no allusion to either statute in the record, and no presumption that the decision was on the Federal Statute can be entertained to give this Court jurisdiction.

In the words of C. J. Fuller in

Johnson vs. Risk, 137 U. S., 307.

"When there is a Federal question, but the case may have been disposed of on some other independent ground, and it does not appear on which of the two the judgment was based; then if the independent ground was not a good one, sufficient to sustain the judgment, this Court will take jurisdiction of the case. * * * But where a defense is distinctly made, resting on local Statutes, we should not, in order to reach a Federal question, resort to a critical conjecture as to the action of the Court in the disposition of such defense."

In the case at bar, if plaintiff in error had any defense it was as clearly a defense under the State law as under the Federal. Nothing was said or is to be found in the record, whether the instructions asked and refused, which it is now contended raised a Federal question, was based on the State law or the Federal law, and here it may be said, the record fails to show any decision of Federal law, because the same question could be raised in the same way on the State law, and the decision may well rest on the local Statute; and it certainly does *not appear* that the ruling as made could not have been made upon the State Statute, or was necessarily upon the Federal Statute.

Although a Federal question may have been raised, yet if the question is decided on either local law or ordinance of a city, and that ground is broad

enough to support the decision, this Court will refuse to entertain jurisdiction.

Henderson Bridge Co. vs. Henderson City, 141 U. S., 679-688.

Hopkins vs. McLure, 133 U. S., 385, 386, and

Murdock vs. City of Memphis, 20 Wall., 636.

In McManus vs. O'Sullivan *et al.*, 91 U. S., 579. the Court dismissed writ of error to the State Court for want of jurisdiction because there was a ground under the State law upon which the decision could rest (and the Court further says it will look into the decision to see what the Court did decide.) All the cases hold that to give jurisdiction to the Supreme Court to review decisions in State Court, the record must show that the decision of a Federal question *was necessary* to a determination of the case.

Brown vs. Atwell, 92 U. S., 329, and cases cited.

In Citizens' Bank vs. Board, etc., 98 U. S., 140, writ was dismissed because a decision in the State law was sufficient to sustain judgment and no Federal question necessarily arose.

In Adams Co. vs. B. & M. R. R., 112 U. S., 123, writ was dismissed on the same ground. The same is true of the decision of

Detroit Ry. Co. vs. Guthard, 114 U. S., 133.

Blount vs. Walker, 134 U. S., 614.

It is clear, we think, that the same principles upon which the jurisdiction of this Court is to be determined in reversing the decision of a State Court, are involved in the case at bar. *Necessity* of deciding a Federal question, is the test in both

cases, *dependence* of jurisdiction upon a decision of a Federal question, can now be asserted, except when the decision one way or the other, rests upon that question, and in the case at bar it does not rest upon that in the slightest degree.

Jurisdiction does not attach unless the record shows that some law of the United States must be met and decided.

Bridge Proprietors vs. Hoboken Co., 1 Wall., 116.

Brown vs. Colorado, 106 U. S., 95.

Gibbs vs. Crandall, 120 U. S., 105.

There is no jurisdiction on grounds of necessity for construction of statutes, because, not only was the right in question so plainly given by statute as to make construction of the Court unnecessary, and the same right in the same terms secured by a State law that was not in conflict with the Federal law, but, this statute before the trial of the cause, had been applied, or if counsel for plaintiff in error prefers the term construed both by this Court, the Circuit Court, and the State Courts, and always, and by all Courts construed in the same way. As we have seen, there is sought to be introdnced in the statute an exception to its operation in any case where the discovery and patent of a party seeking to follow the vein on the dip beyond his side lines, was junior to patent of the party into whose ground the vein dipped, and there *is no exception* of the kind or *anything that suggests any exception in the statute*, and this Court, like all Courts, is powerless to make any. This rule has been held to be one that cannot be departed from without assuming on part of the judicial tribunals

legislative powers. "Where the legislative makes a plain provision, without making any exception, the Courts can make none."

French vs. Spencer, 21 How., 238.
McIver vs. Ragan, 2 Wheaton, 29.
Yturbide vs. U. S., 22 How., 290.
Thornley vs. U. S., 113 U. S., 310.
Poor vs. Considine, 6 Wall., 479.

In Lake County vs. Rollins, 130 U. S., 670, this Court states the rule to be—

"That if the words convey a definite meaning, which involves no absurdity, nor any construction of other parts of the instrument, then the meaning apparent on the face of the instrument must be accepted, and neither the Courts nor the Legislature have a right to add to it or take from it. So, also, when a law is expressed in plain and unambiguous terms, where the terms are general or limited, the Legislature should be intended to mean what they have plainly expressed, and, consequently, no room is left for construction."

Ninth—Again, when a statute has received a construction by the highest Court of the State, or a Federal statute by this Court, the construction becomes a part of the statute and its effect and meaning are the same as though inserted in it. And so strongly do Courts adhere to this rule, that where the laws of a foreign county are adopted by this county, the uniform rule is to adopt the construction put upon the law by the Courts of the county from whom the law is derived.

Carthcart vs. Robinson, 5 Pet., 264.
McDonald vs. Hovey, 110 U. S., 619.

In Douglass vs. County of Pike, 101 U. S., 677, this Court says:

"After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intent and purposes, the same in its effect on contracts as an amendment to the law by means of a legislative enactment."

To the same effect is—

Anderson vs. Santa Anna, 116 U. S., 361.
German Bank vs. Franklin Co., 128 U. S., 538.

No good reason can be given why this principle does not apply with equal, if not greater force to rights acquired by the expenditure of time and money, induced by the words of the statute and the construction put upon it by the Court, especially when the known object the statute was to induce such action and provide for the acquirement of title under it.

It follows from this logically and inevitably that a question or point in application or construction of a statute having once been decided by this Court, the statute thus construed is no longer open to construction on that point, since the construction has become a part of the statute construed, and hence no federal question whatever and by reason of these instructions, because the statute had been construed for years and all construction was one way.

In the words of Justice Brewer in—

State of Kansas vs. Bradley, 26 Fed. Rep., 289—

"When a proposition has been decided by the Supreme Court it can no longer be said that there remains a federal question."

It only remains now to notice the decisions of this Court upon this point. In Mining Co. vs. Tarbet, 98 U. S., 467, the Court says:

"Both parties agree on the general rule that the owner of a mining right in a lode or vein cannot follow the course of a vein beyond the end lines of his location, but that he may follow the dip to an indefinite distance beyond his side lines. *This is undoubtedly the general rule of mining law and the true construction of the act of Congress.* The language of the act of 1866 (14 Stat., 251), in relation to a vein or lode, is that 'no location hereafter made shall exceed two hundred feet along the vein for such locator, with an additional claim for discovery to the discoverer of the lode, with the right to follow such vein to any depth with all its dips, variations and angles, together with a reasonable quantity of surface ground for convenient working of the same, as fixed by the local rules.' The act of 1872 (17 *id.*, 91), is more explicit in its terms; but the intent is undoubtedly the same as it respects the end and side lines and the right to follow the dip outside the latter."

This decision is of the first importance, both because it is the first decision on this point, and states the question of the right as *undoubted*, and makes no qualification of the right, but especially recognizes the fact that the statute was the law of miners before its enactment, and inasmuch as all claims by the law itself could be had only by compliance "with State, territorial and local regulations, not conflicting with the laws of the United States," it is clear that there is in this decision a holding that the miners law and the State statute, are not in conflict, both giving the same right on the same terms.

Again, in

Iron S. M. Co. vs. Cheesman, 116 U. S., 529,

The decision was directly and *solely* on this point and holds that "Sec. 2322" "gives to the owner of a mineral vein or lode *not only all that is covered by the surface lines of his claim, as these lines are extended vertically, but gives him the right to possess and enjoy that lode by following it when it passes outside of those vertical lines laterally.*" In that case the plaintiff held by patent, the defendant by location and possession only, and the Court says: "Plaintiff relied upon his right to pursue his vein outside of his side-lines so far as the vein extended."

The case was tried without mention of any exception as to date of patent on the theory, that if plaintiff proved the continuity of his vein from the apex in its own side lines, it could recover; and this Court affimed that view of the case.

In—

Iron S. M. Co. vs. Elgin, 118 U. S., 196, 206, 209,

Justice Field, in delivering the opinion of the Court, and speaking of this Section 2322, says:

"This section appears sufficiently clear on its face. *There is no patent or latent ambiguity in it.* The locators had the exclusive right of possession and enjoyment of 'all the surface included within the lines of their location.' They have, also, the exclusive right of possession and enjoyment of all veins, lodes and ledges *throughout their entire depth, the top or apex of which lies inside such surface lines extended downward vertically, although such veins, lodes or ledges, may so far depart from a perpendicular in their course* downward *as to extend* outside the vertical side lines *of said surface location.* The surface side lines, extended downward, vertically determine the extent of the claim, except when in its descent the vein passes outside of them, and the outside portions are to lie between vertical plains drawn downward to the end lines."

In this case there was a dissenting opinion by C. J. Waite and J. Bradley, but this opinion agrees with the other that, "*Whenever the top or apex of the vein is found within the surface lines extended vertically downward, the vein may be followed outside of the vertical lines.*" Nobody suggested any exception of the kind now under review, although by reference to the facts as set forth in the opinion of the Court the same question as to priority of patent could have been raised as in this case, since it appears that in that case the plaintiff's claim that the Gilt Edge patent was not issued until 1882, while the defendant's patent to the Stone bore date 1877.

In the celebrated case of

Richmond Co. vs. Eureka Co., 103 U. S., 839, 847,

the same doctrine is asserted, and it is there said: "The finding that the ground in dispute is within the end lines and that the apex is within the surface line, settles the right of the parties between themselves as *well under the patents as under their agreements.*" This too was a case where, though the one patent was dated July 16, 1872, and the other April 30, 1874, yet the question now under review was not raised. In

Argentine vs. Terrible M. Co., 122 U. S., 478, 480, 484,

Justice Field says: "An instruction that averred *the unqualified* right of party having the apex to follow outside of his side lines on the dip was *undoubtedly sound law.*"

This case, too, was one where the older claim was defeated, it being located in 1876, while the other claim was located in 1877, and nobody thought

that that altered the law, or gave rise to any rule different from that expressed in Sec. 2322.

The same doctrine is held in Gwillim vs. Donnellan, 115 U. S., 47, 48, and Hunt vs. Cheeseman, 33 F. R., 103.

Without referring to a score of cases that could be referred to, decided by the State Courts and the Circuit Courts of the United States, it may be said that *not a single case can be found in any Court where the decision is in respect to lode property under Sec. 2322*, that even suggests any such distinction or construction in or of that section as is contended for by plaintiff in error here. As early as 1878, the Supreme Court of Colorado in

Wolfely vs. Lebanon M. Co., 4 Colo., 112,

announced the same doctrine in an unqualified manner, and without suggesting any exception, and reaffirmed it in the case of

Johnson vs. Buell, 4 Colo., 551,

in 1879, and as early as 1879, in the case of

Stevens vs. Williams, 1 McCreary, 480,

in the Circuit Court of the United States, the Court, speaking by Justice Miller, announced the same unqualified right of a locator to follow the dip of his lode; and it is safe to say that the same doctrine has been held by the Circuit Court in at least a score of cases, and the correctness of the decision has never been questioned until questioned in this case. Such decisions have become rules of property, rules upon which property worth millions is now held, and this Court will not depart from them. Since the Supreme Court of Colorado holds to the rule and it relates to the acquisition of property by

State law, this Court will hold the same way on the same law.

Bondurant vs. Watson, 103 U. S., 289.
Jackson vs. Chew, 12 Wheaton, 162.
Beauregard vs. City of N. O., 18 How., 497.
Burgess vs. Seligman, 107 U. S., 20.

In Bucher vs. Cheshire R. R., 125 U. S., 583, 584, this Court says that, "When the decisions of State Courts relate to State law or local customs and these laws or customs have been established by repeated decisions of the State Courts, their decisions become the law governing the Federal Court sitting in the State." As already noticed, the decision of the Supreme Court of Colorado on the law of the dip was had at the April term, 1878, even earlier than the earliest decision of this Court on the subject. Besides that the customs of miners was the earliest law, and as this Court has expressly held the law of Colorado and the United States is identical with the custom of miners.

We submit that this Court ought not and will not hold as anything but frivolous and made for delay, objections to a construction of the Courts below that is in exact accordance with both the language of the statute and the repeated express and positive decisions of this Court. If half a score of decisions of this kind, extending over a period of nearly twenty years is not enough to establish a construction, when shall it be done? If counsel may with impunityquestion such decisions and insist that judgment must be delayed for years to allow this Court to repeat its rulings, when and under what

circumstances may one assert that appeals like this on grounds like this are interposed for delay? If the question of proper construction of Section 2322, the necessity for construction being the sole ground of jurisdiction is not so "frivolous as not to need further argument," when will plain unambiguous language and repeated decisions ever render a question so settled that to dispute it renders the question frivolous enough to come within the rule?

We come now to the last reason assigned for dismissal, viz., to the exceptions contained in the record. We contend that the appellate jurisdiction of this Court attaches only when error in the Court below is shown by the record, and that when there is no error shown, the Court will not take jurisdiction; that this is the rule adopted in writ of error to State Court we have shown by the cases above cited, and it is clear, we think, that this is equally true of writs of error from the Circuit Court to the Court of Appeals or from the Court of Appeals to this Court. If the record fails to show error, there is no jurisdiction in this Court to review. If an act is of such character that error cannot be assigned on it, then this Court can do nothing but dismiss the writ or affirm the judgment. This has been held by this Court in cases where discretion was allowed and the Court held that writ of error would not lie.

Morsell vs. Hall, 13 How., 212.

When error will not lie for any reason, whether the amount is insufficient or the judgment not final, or otherwise, the Court will dismiss the writ.

Smith Trabue, 9 Pet., 4.

McCargo vs. Chapman, 20 How., 555.
Waldon vs. Craig, 9 Wheat., 576.
Evans vs. Gee, 14 Pet., 1.
Gregg vs. Forsythe, 2 Wall., 56.
U. S. vs. Abatoir, 106 U. S., 160.

If there is no jurisdiction for any cause whatever, the writ must be dismissed.

Ex parte McCardle, 7 Wall., 514.

In view of these principles, let us look at the record. By the rules of the Court of Appeals, promulgated June 20, 1892, Rule 23, the plaintiff in error and defendant in error could, by agreement, designate such part of the record as the Clerk should print, and the rule says, "and the Court will consider nothing but those parts of the record in determining the questions raised by the errors assigned."

The printed record on which this motion is by stipulation to be heard in this Court is identical, so far as the proceedings in the Circuit Court and the Circuit Court of Appeals are concerned, up to the decision in the Circuit Court of Appeals, and the remainder of the printed record here presented, consists of opinion of the Court of Appeals, petition for rehearing and assignment of errors in this Court. This record contains but a small portion of the bill of exceptions, but as will be seen by the stipulation, under the twenty-third rule of the Court of Appeals, it contains all that plaintiff in error thought was essential to this case and expressly recites, that it contains "all the instructions given by the Court and remarks of, and exceptions taken by counsel," while the assignment of errors then to wit: September 16, 1891, made certainly

show all the errors of which complaint was then made.

We confess we are not advised what the procedure will be in this Court, whether it will review the decision of the Court of Appeals only or review the whole record, both of the Court below and that of the Court of Appeals, since this case is, so far as we know, the first case of this kind before the Court. But in either case, it must be true that this Court will not notice, review or discuss matters alleged as error except such as are properly raised in the Circuit Court; and hence it will be observed that in the printed record, as well as that part of it not printed and filed in the Circuit Court of Appeals, there was at no time, any assignment of errors, or objection to the reception or rejection of evidence, and the sole and only errors ever raised by objection and exception, or by assignment, in the Circuit Court relates solely to the giving and refusing to give instructions, and an inspection of the record in this Court shows that there is no assignment of errors whatever in THIS Court, except errors, as it is plainly and explicity alleged, of the Circuit Court of Appeals.

Every assignment in this Court is of that character. It seems to us that plaintiff in error has voluntarily put itself in a position where it can complain of no errors except those of the Court of Appeals. Hower this may be, we think it must be true that this Court will not, and probably cannot, review any error of the Circuit Court not assigned as error in the first instance in the Court of Appeals. An inspection of the assignment of errors in the latter Court shows each and every error assigned

was in giving and refusing instructions and refusing to grant a new trial. In this Court the errors assigned—though twenty-six here, as against twenty in the other Court—are on the same ground; and it might as well have been forty, since all that need be done was to cut up the entire instruction of the Court into paragraphs and allege error on each one. In respect to these errors we say:

There is clearly no possible ground upon which any error can be urged in respect to instructions alleged to have been asked by plaintiff in error, because these instructions *are not set forth*, nor do we have any *record of an exception* to a *refusal to give any instructions whatever*. True, the assignment of errors does set forth certain instruction—Numbers 1 to 16 inclusive—and the counsel for plaintiff in error says he desired to except to several things, and among others, "In regard to refusal of the Court to give our instructions Numbers 1, 2, 3 and so on, consecutively on points of law." And he also said, "There are one or two in the three we raise clear points of law; we wish a ruling on them." To which the Court replied, "I decline to give these instructions;" and then counsel says, "I will ask if I did not specify to except to the refusal to give *those specific instructions*." See record, page —. This, then is all there is in the printed record, aside from the assignment of errors, that shows that plaintiff in error asked any instructions, and it does not show what they were, except "Numbers 1, 2, 3 and so on consecutively," and the *sole and only* exceptions shown by the record *ever* taken was to a refusal to give "those specific instructions;" besides that, counsel claimed

at that time, to wit, when the exception was to be taken, if taken at all, that only in two out of the three had he stated a question of law. Nobody will claim that the *assignment of errors filed* three months after the trial—September 16, 1891—can be considered as the record of exceptions taken to *instructions refused.*

It is true, that the bill of exceptions, in part not printed, does set forth a series of instructions, sixteen in number, asked by defendant and refused by the Court, but there was no exception taken to such refusal upon which this Court will consider them. The exception is as follows: "But the Court declined and refused to give the aforesaid instructions requested by said defendant, to which refusal of the Court to give said instructions numbered ——, the defendant by counsel then and here excepted." Nothing can be plainer then, that the exception is to the refusal to give the series sixteen in number, though the "Numbers" are left blank in the exception; so that it is undisputable that no exception was ever taken that was not as general as the series itself.

On this state of the record, we think we need do nothing but cite the holdings of this Court on exceptions. The rule of this Court is that exceptions taken to a series is not well taken, except in cases where the whole series is correct, and if any one of these was not the law of the case, or was in substance elsewhere given by the Court, the exception thus taken must be overruled. If the exceptions are in mass and only one of them correct, the exceptions must be overruled.

Johnston vs. Jones, 1 Black, 220.

Rogers vs. Marshall, 1 Wall., 644.
Harvey vs. Tyler, 2 Wall., 328.
Ind. & St. L. R. Co. vs. Horst, 93 U. S., 291, 295.
Moulor vs. Amr. Life Ins.Co., 111 U. S., 335.

That all of these instructions were not correct is evident by both what we have already noticed as to the construction of the statutes, and from the fact that plaintiff in error does not in the assignment of errors allege error, except upon *twelve* out of sixteen. Plaintiff in error thus admits that all were not correct or at least that he cannot assign error on refusal to give all of them, and hence the exceptions to instructions refused must be overruled.

The sole and only point of jurisdiction dependent on construction of Section 2322 is not then raised by the record.

It is equally well settled, too, that exceptions to a Court's charge are well taken and will be considered *only* when they point out the particular part of the charge excepted to, so that the Court below and the appellate Court are distinctly informed of the exact language excepted to, and this, too, has been the rule of this Court for a generation at least.

In Johnston vs. Jones, 1 Black, 219, the exceptions to the charge were "to two pages of the views and reasoning of the Court, comments on evidence and on legal propositions," and were as follows: "To the instructions as given by the Court to the jury, the plaintiff then and there excepted," and this exception was not considered.

In the record of the case at bar, the charge,

comments, etc., cover nine full printed pages, the instructions were neither paragraphed nor numbered in any way, and was an unbroken whole—and the sole and only attempt at an exception to it, or any part of it, is found in the latter part of the printed record in the Court of Appeals, as follows: "To the giving *of which said instructions to the jury and each and every of them*, the defendant by its counsel then and there duly excepted." This exception clearly is good for nothing under rule 4 of this Court, should never have been allowed, and is useless under the decision of this Court.

Beckwith vs. Bean, 98 U. S., 266–284.
Lincoln vs. Claflin, 7 Wall., 132–139.
Beaver vs. Taylor, 93 U. S., 46–54.
McNitt vs. Turner, 16 Wall., 362.
Van Stone vs. Stillwell, 142 U. S., 135.
Burton vs. West Ferry Co., 114 U. S., 474, 476.

In Block vs. Darling, 140 U. S., 238, this Court said: "The general exceptions to *all* and *each part* of the foregoing charges and instructions suggests nothing for our consideration. It was no more than a general exception to the *whole* charge." It is clear, then, that an exception like the one at bar, "to the giving of said instructions and each and every of them," when there was, in fact, but one instruction, presents nothing for any appellate Court's consideration. Beside, if a portion of the instruction was correct, a general exception must be overruled by all these authorities. That a portion, and a large portion, was correct, is clear from the fact that, though the *assignment of errors* sets out *in haec verba* the portion of the charge the

plaintiff in error now complains of, yet but two pages out of nine covered by the charge are referred to or set out in assignment of errors. It is clear that about four-fifths of the whole charge was admitted to be correct. But, more than this, the assignment of errors was not filed until the 16th of September, 1891 (record, p____), while the trial was had on the 20th to the 25th of May, and motion for new trial overruled June 25th, and final judgment entered July 10, 1891, from which it is clear beyond dispute that plaintiff in error never, as appears by the record, excepted to a refusal of the Court to give any instruction set up or shown in the record, and never made any legal exception which any Court would consider to any part or portion to the charge of the Court, except that found at_____ of the printed record, to wit, a recalling of the jury and further instructions, counsel for plaintiff in error being absent.

The holdings of this Court are uniformly to the effect that if the record fails to show error—that is, fails to show that exception to the ruling of the Court was taken during the "progress of the trial," the Court may dismiss or affirm. If the writ of error is regular and the record fails to show error, the Court will affirm, because in such a case there is no ground for the action of this Court.

Lathrop vs. Judson, 19 How., 66.
Stephens vs. Gladdy, 19 How., 64.
Suydam vs. Williams, 20 How., 441.

This rule is distinctly laid down in

Hanna vs. Maas, 122 U. S., 24–27,

and in Insurance Co. vs. Sea, 21 Wall., 158–162,
Norris vs. Jackson, 9 Wall., 125,
England vs. Gebhardt, 112 U. S., 502–505.

"Alleged errors not presented in bill of exceptions nor apparent on face of the record are not proper subjects of re-examination by writ of error in this Court."

Storm vs. U. S., 94 U. S., 76–81.

In

Balt. & P. R. R. Co. vs. Trustees, etc., 91 U. S., 131,

this Court says: "But it is equally true that if the transcript does not show that any error exists in the record, the judgment must in *all cases* be affirmed, except when it appears there has been a mistake." It is clear then to a demonstration, that since there was no sufficient exception taken by plaintiff in error to giving or refusing of any instruction upon which the jurisdiction of this Court can rest, there is no error shown by the record, and hence there is no jurisdiction to review the record of the Court below.

Lastly, we notice the motion to affirm the judgment, united with a motion to dismiss the writ. Under paragraph 5 of Rule 6 of this Court: "Motion to affirm a judgment may be united with a motion to dismiss a writ of error or appeal, on the ground that though the record may show that the Court has jurisdiction, it is manifest that the writ of error or appeal was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument." The decision of this Court of cases under the rule are numerous, and they seem to establish the following proposition, viz: that the record being printed so the Court can readily see what is involved, the Court favors such motions, and will hear them at

any time when Court is in session and before the return day of the writ, and that all that is necessary to an affirmation in a case where no error is apparent is that there should be color for the motion to dismiss.

Nat'l Bank vs. Ins. Co., 100 U. S., 43.
Clark vs. Hancock, 94 U. S., 493.
Thomas vs. Woodbridge, 23 Wall., 288.
Whiting vs. Cook, 99 U. S., 607.

As to what is sufficient color, it seems that it may arise out of almost any question whether of construction of statute, rule of practice or decision of the Court, and if any fair and *bona fide* ground whatever is seen to be the basis of the motion that is enough, and though the motion is clearly not well taken to dismiss, the motion to affirm will be granted in a proper case.

Hinckley vs. Morton, 103 U. S., 764–5.

The case of—

Micas vs. Williams, 104 U. S., 556,

Is a case in one respect identical with the case at bar, where one ground of motion to dismiss a writ was, that no sufficient amount to invoke jurisdiction appeared in the record, party was allowed to show it by affidavits, yet motion to affirm was allowed.

In—

Pacific Express Co. vs. Malin, 132 U. S., 531–538.

The record did not show exceptions to the ruilings of Court assigned for error was taken in time and the judgment was affirmed.

That is the exact condition of the record in this case, that is, it fails to show legal exceptions

to the ruiling complained of on which error is assigned was ever taken. So in—

Sire vs. Ellithorpe P. Co., 137 U. S., 579, 583.

The motion to dismiss was denied, yet motion to affirm allowed on the ground that the bill of exceptions or record showed no error. So, to in—

Bells Gap R. R. Co. vs. Pennsylvania, etc., 134 U. S., 236,

Motion to dismiss writ of error to State Court, was denied, though a Federal question did clearly arise, yet judgment was affirmed because of the doubts whether the Court actually decided the case on the Federal question.

From all of which it must be apparent that color for the motion to dismiss in the case is sufficient to allow affirmation of the judgment on the ground that the case is here for delay only and that the alleged necessity for the construction of a Federal Statute is, under the authorities cited and on the record, "Too frivolous to need furthur argument, this Court will not hold it for furthur argument. The only question upon which any claim whatever, as to the jurisdiction of this Court and the right of plaintiff in error to have the judgment of the Court of Appeals reviewed, is the construction of Section 2322, but, by the plain provisions of the statute and the equally plain provisions of the State law, and the customs of miners as well, and the repeated decisions of this Court, the right contended for never had any existence. To construe the section different from what it was construed by both the lower Courts, would be, not only to construe after the Court had years before

declared that this very section had no patent or latent ambiguity about, and needed no construction, but to overturn by construction a rule of property, established by this Court and the State Courts, for at least fifteen years, and without cause to abandon a construction repeatedly held by this Court and followed by every State Court and Federal Court in which this section, or a similar law, has been passed upon. No Court can ever be expected to act in that way, and no one knew the frivolity of this claim of a necessity for a new construction better than the eminent counsel who tried this case and whose name appears in this Court. In a work much used in Colorado and published about fifteen years ago and re-copyrighted and published by the Senior Counsel in this case in 1892, entitled "Morrison's Mining Rights," the author, Mr. Morrison, on page 109, after quoting this section, says: "The common law grant of lands conveys the surface and whatever mineral underlies the surface within lines drawn perpendicularly downward toward the center of the earth. The above section implies a departure from the rule; a lode location under its terms, or a patent issued upon such location, being in the case of a location a conditional, in the case of a patent an absolute grant (1) of the surface, (2) of the veins whose tops or apexes lie within its side lines, *wherever the dip may carry them;* and on the other hand other veins whose top or apexes are outside of the lines, but which dip underneath the location or patent, *are excepted in favor of the proprietor of such underlying vein.*" From which it is clear that as an author, he will not, even while this suit was pending, assert as even probable

the doctrine now and in this suit by him contended for. It is clear that if veins whose apexes are outside of the earlier patent, are excepted from that patent in favor of the proprietor of such underlying vein, the earlier patentee takes no right whatever in such veins, and so the question of which was the earlier cuts no figure, because whether earlier or later, the right to follow the vein on the dip depends not upon date of patent or discovery, but upon the location of the apex. Hence, we say, it is clear that counsel here raised the question for obstruction and delay only; that of his own showing the question of jurisdiction requires no further argument, and the judgment of the Court below should be affirmed.

WILLARD TELLER,
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No......

In the Supreme Court.

THE COLORADO CENTRAL CONSOLIDATED MINING COMPANY,
Plaintiff in Error,

vs.

JOHN TURCK,
Defendant in Error.

Brief of Plaintiff in Error Answering Brief of Defendant in Error on His Motion to Dismiss.

C. J. HUGHES,
SIMON STERNE,
R. S. MORRISON,
Attorneys for Plaintiff in Error.

United States of America, ss.

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vs.

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Defendant in Error.

Brief of Plaintiff in Error Answering Brief of Defendant in Error on His Motion to Dismiss.

This case was ejectment by John Turck, as plaintiff, brought by filing complaint in the United States Circuit Court at Denver.

After final trial and judgment for plaintiff it went by error to the Circuit Court of Appeals.

The judgment was there affirmed, whereupon the Colorado Central Company was allowed, on application to Mr. Justice Brewer, leave to bring the same by error to this Court.

The present motion is to dismiss the writ for want of jurisdiction.

The motion depends upon the construction of a single section of an Act of Congress, and possibly upon the construction of a single word in that section.

Section 6 of the Act establishing the Circuit Court of Appeals says (Supt. Rev. Stat., p. 903):

And its judgments "shall be final in all cases in which the jurisdiction is dependent *entirely* upon the opposite

parties to the suit or controversy being aliens and citizens of the United States or citizens of different States," etc.

"In all cases not hereinbefore in this section made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States when the matter in controversy shall exceed one thousand dollars besides costs."

The original complaint made the formal averment that plaintiff Turck was a citizen of Colorado and the defendant company a citizen of New York.

The case was, therefore, one where the jurisdiction was dependent on citizenship, but in both complaint and answer, as well as in the testimony and instructions, it was a controversy federal in its character, and dependent for its result on the construction of the Mining Acts of Congress, so that the jurisdiction, had both parties been citizens of the same State, would have remained in the Federal Court.

The jurisdiction was, therefore, not dependent entirely on citizenship but also on the fact of its involving federal questions.

This brings at once to the Court the force of the word *entirely* in the statute; for the only effect which can be given to that word is to assume that it applies to cases where the Federal Court has jurisdiction on account of citizenship and also jurisdiction on some other ground which, in this case, is the ground of federal construction.

That the lower Courts had jurisdiction on the ground of citizenship is not disputed, but the defendant in error says that there was no other ground of jurisdiction, and, supporting this point, he adds: that the only federal question on which error is based is assignments of error 1–4 in Court of Appeals, and that such is, "whether a patentee of a lode claim whose discovery and patent is later than the date of another's patent, may follow his junior patented lode into the other's patented ground on the dip, the later patentee having the apex of the lode patented within the side lines?" But this citation by him of what was involved is enough to show a material federal question, unless such was only an incidental or collateral point in the case without deciding which a final judgment might have been given.

The Circuit Court had original jurisdiction under the

Act of 1875,* "of all suits of a civil nature at common law or in equity * * * arising under the Constitution or laws of the United States." The Act of 1878† contains exactly the same words, and both are in substance a repetition of the words of Section 2, Article III of the Constitution, in which jurisdiction is conferred on Federal Courts and appellate jurisdiction upon this Court, subject to such exceptions and regulations as Congress may make. And, as Congress has not made an exception, the appellate jurisdiction of this Court exists, subject to regulations, if any, made by Congress.

It seems, therefore, self-evident that jurisdiction to review exists in a certain class of cases, to wit: cases where the jurisdiction of the Circuit Court of Appeals was not dependent entirely on citizenship, and it only further remains to apply the case to the law, and see whether we come, as a case, within that class.

We concede, further, that the jurisdiction must appear from the record, in some form.

Federal Question shown in Pleadings.

The matter, then, resolves itself into these two questions:

1. Was the jurisdiction dependent entirely on citizenship?

2. Does that fact appear of record?

It is true that in the original complaint the formal averment of diverse citizenship was made. This was enough to excuse bringing the suit in a Federal Court. The case might then be indifferently federal or non-federal in the character of the issues about to be raised., It was not necessary nor usual to aver any further matter as jurisdictional grounds.

The fact that it was a federal case on other grounds was a matter then to be gathered from the pleadings and other parts of the record if at any time it became material to show that jurisdiction existed on grounds other than that of diverse citizenship.

*18 St. L., 470.
†Supt. Rev. Stat., 611.

But this fact does appear at the outstart from the complaint, answer and replication.

The complaint avers (fol. 2) that plaintiff owns the Aliunde lode as patented; that its apex is within his patented lines, and that owing to the dip of said lode to the northwest at a depth of about 300 feet, said lode passes under the north side line of said patent and enters the land adjoining.

The complaint, therefore (a very unusual instance), anticipating our defense, alleges a state of facts which have no significance except by reference to mining acts of the United States, in which, for the first time in American legislation, a patent is contemplated, bounded by other than common law, vertical planes, and the ownership of an apex is allowed to justify a departure from such vertical planes.

On first reading the answer, the thought of any lawyer familiar with our mining legislation must be that the complaint invites an issue on the federal statutes introducing the apex and the dip as elements in the grant of a lode patent.

The answer (fol. 4) denies that the Aliunde lode has the pitch alleged; denies (under the Colorado Code form of denial) that its apex is within the Aliunde patent; denies that at the alleged depth it passes under the north side line of said patent.

And for a further defense the defendant pleaded the patent to the Colorado Central Lode; that said Colorado Central Lode was patented long before the real or pretended discovery, location or patenting of said Aliunde Lode; that said Colorado Central Lode lies immediately north of and adjoining the Aliunde survey, "and that whatever vein the defendant has worked on is the vein of the Colorado Central Lode."

The replication to the further answer denies defendant's ownership of the Colorado Central Lode at any point beyond 150 feet southwest from the Harris shaft on said lode, and avers that at such point the Colorado Central Lode leaves its southeasterly side line and passes into the Aliunde survey; that beyond that point it ceases to be parcel of the Colorado Central Lode, in fact or in law, but becomes parcel of the Aliunde Lode; and denies that the top or apex of the

Colorado Central Lode is within its side lines beyond a certain point; denies that any part of the Aliunde Lode is any part of the Colorado Central Lode.

Thus the complaint, answer and replication make but one issue, to wit: whether or not the apex of the lode on which defendant has been working is within the Aliunde patent or within the Colorado Central patent. And, as matters of law upon the facts alleged, the Court must find the effect of the two grants, and construe the law under which they were made.

It is not only a federal case, but a typical federal case. The allegations of complaint and answer have no sense or meaning unless read side by side with Section 2322 of the Revised Statutes concerning the dip and apex of lodes. And if the motion had been made to dismiss the case because, for instance, the Court had been informed that both parties were citizens of the same State, such motion would have been denied, because upon the pleadings themselves the only issue made, or that could have been made, involved the construction of the federal statute almost in terms recited in both complaint and answer.

Federal Question shown by the Opinions.

If tested by the opinion of the intermediate Court, or its equivalent, the instructions of the lower Court, it is also seen to be in terms a case dependent for its decision upon the construction of said federal section; and, in fact, there was no technical question such as denial of ouster, failure of one party or the other to prove his chain of title, or other point at which, at any stage, either Court could have decided the case on the issues presented without premising the two patents held by the parties and their respective rights under the Mining Act of Congress.

Federal Question shown by the Evidence.

If tested by the evidence (both the evidence and the opinion and instructions are in this case by stipulation, if not *per se*, parts of the record), the entire evidence, of about twenty witnesses on a side, is to determine the question of apex, dip, lode matter and other incidents of the main issue,

neither party, at any stage, attempting to secure a decision on any side or collateral issue, unless we may except the insinuation of the defendant in error in the Court of Appeals that our exceptions were not specific enough to warrant review of the alleged errors.

Tested, therefore, at any stage, the case is one which "really and substantially involves a dispute or controversy as to a right which depends upon the construction or effect of some law of the United States"—as the test is stated in one of defendant's citations; *Gold Washing Co.* v. *Keyes*, 96 U. S., 203.

Alleged Settled Point.—No Alternative Decision.

In defendant in error's brief, divisions *Sixth* and *Seventh* (Brief, 13–18), the point is made that no question is involved, because the language of the statute is so clear that it admits of no alternative construction. It is sufficient answer to this to say that in the only two cases known to counsel where the exact point has arisen, to wit: Can a junior patentee follow on the dip his vein underneath the side line of an older patent? [In both cases, the holder of the junior patent holding no title before the entry of the senior, as in this case.] In both cases the decision has been that he could not follow his lode on the dip, notwithstanding the language of the statute and of his patent.

Pacific Co. v. *Spargo*, 16 Fed., 348.

Amador Co. v. *South Spring Co.*, 36 Fed., 668.

And in another form the question in the case at bar is, can the junior patentee follow on the dip a lode already patented to a prior discovery, at a point where the apex of the lode may not be within our patent, although we had within its lines the body of the lode—which point has never been decided specifically, although very closely reached, and is to the extent of its decision, a precedent in our favor in *Van Zandt* v. *Argentine Co.*, 2 McCreary, 159; 4 *Mining Rep.*, 441. Affirmed *sub nomine*, *Argentine Co.* v. *Terrible Co.*, 122 U. S., 478.

State Law not Involved.

Defendant in error's point *Eighth* (Brief, p. 19), is that this Court has not jurisdiction, "Because the record

shows no decision on a United States law necessary. The language of the State law is clearly sufficient to enable the defendant in error to follow the lode on the dip, and as it was not in conflict with, but wholly consistent with, the United States statute, his rights and the rights of plaintiff in error could be determined on the State law alone.

This point refers to a State statute (Mills' Ann. Stat., Sec. 3156) passed in 1874—long after the Colorado Central patent issued—a section which has never been cited in the entire litigation, has never been mentioned in the arguments and has absolutely no relevancy. It is nothing more than a declaratory section, intended to prevent conflict between Federal statute and State construction, and certainly the counsel would not contend that a United States patent can be interpreted under the terms of a State statute. If it is in conflict with the Federal statute, it is void, and if it is harmonious it is merely nugatory.

No Final Construction in this Court.

Defendant in error's *Ninth* point is that the statute has already received a final construction by the Supreme Court. He cites *Mining Co.* v. *Tarbet*, 98 U. S., 467; *Iron Co.* v. *Cheesman*, 116 U. S., 529, and other cases. These are all apex cases, and hold, as the statute holds, that a patentee in general can follow the lode on its dip. That is all that they hold, and no party to this record has ever asserted the contrary to the general proposition. But it is not one simple and decided question. In the very first citation, *the Flagstaff case*, the Court decided that the lode could *not* be followed on its dip on the facts of that case. In *the Argentine case* (affirming the decision below where the point is specifically made that a location on the dip cut off a later location on the apex above), the junior patent above was not allowed to follow the dip. So, that in both cases the right in the particular case to follow on the dip was denied. So in the matter before this bench, we say that, where a patent was finally issued, and its holder is at work on the same vein found at its discovery, though at a point further west and where the apex may be south of our lines, and such vein so in our possession and underneath our lines, is not even discovered outside our lines till years after our patent issued, we say

that there is no exception in such case in favor of the patentee of such later discovery to come under our lines; and such has been the ruling in the only two cases where the point has arisen, to wit, the *Spargo case* and the *Amador case*, already cited.

Exceptions Not Specific.

These are all the points made in the brief to its page 31, where the obscure point is made "that the appellate jurisdiction of this Court attaches only when error in the Court below is shown by the record." The logical inference from this mode of stating it is that only cases which are to be reversed are to be appealed, and the appellate Court must try the case before it issues the writ of error.

On the same page it is put in more correct shape: "If an act is of such character that error cannot be assigned on it," then this Court must dismiss the writ.

The latter statement is doubtless correct. But our case is exactly like any other appellate proceeding from a Supreme Court where the appeal or writ of error brings up the proceedings in such Court of intermediate review.

The point as finally elucidated in the argument seems to be that our exceptions to the charge of the Circuit Court were not sufficiently specific. This point was made in the Court of Appeals, and there decided against the defendant in error.

We were endeavoring to make our exceptions specific, and certainly did so when the Court remarked (record, p. 93), "your exception covers the whole matter."

This is no point on which to dismiss a case, for want of jurisdiction. It is purely a matter of practice when a case is reached, and it is illogical to say that an appellate Court, because errors were not specifically assigned, has, therefore, no jurisdiction to review. It may, in a proper case, be ground to refuse an appellant the consideration of points not specifically taken, but it does not take the case out of the class of reviewable cases. If exceptions were not properly presented, it is matter of consideration later, on the argument, but not a jurisdictional point, and we are fully prepared to meet it when reached.

Construction of Section 6.—Case not Dependent "Entirely" on Citizenship.

We have been endeavoring to follow the argument made by the learned counsel in his brief, and we come now to the determinative point in the case.

The act allows writs of error where the jurisdiction is not dependent entirely on citizenship.

Northern Pacific R. R. v. *Amato*, 144 U. S., 465, seems to be the only case where this section is cited with reference to this clause. In that case there was apparently diverse citizenship, but the case had been removed on the ground of its arising under an act of Congress. The Court refused to dismiss, citing the statute. The point is the same as that at bar save that in the *Amato case* the "construction of statute" clause, appeared in the petition to remove, and in our case appears upon the pleadings. We see no substantial difference in the two cases.

If we consider the statute as drawn, as it was, by an eminent federal lawyer, we would assume that he would never frame it with intent to deprive this Court of its primary function of being the final decider of federal questions. And it was to cover this essential point that the word "entirely" was used by Mr. Evarts in the context where we find it.

It is also probable that a much less eminent lawyer, a man of clerical handiness, would have framed a clearer statute, but the intent to save such jurisdiction must be assumed, and we find it expressed in the language of the scholar and grammarian, if not in the language of the clerk.

An analysis of the section shows that it makes non-appealable, Patent, Revenue, Criminal and Admiralty cases. Why? Because these are matters of exclusively federal jurisdiction. State Courts have nothing to do with them. There can be no conflict of decision, because only Federal Courts deal with these cases.

It also makes non-appealable, cases where jurisdiction depends solely upon citizenship. Why? Because such cases involve only ordinary points of litigation not connected with the decision of federal law.

But, where the case is not dependent entirely upon

citizenship, and is not a Revenue, Patent, Admiralty or Criminal case, it must, by elimination, be a case involving federal construction on some branch of federal law, where State and Federal Courts have more or less concurrent jurisdiction, and to this class of cases it is essential to the integrity of its appellate jurisdiction that this Court should retain reviewing power, and such power is preserved to them by the use of the word "entirely." To be deprived of jurisdiction, the case must depend on citizenship only. Otherwise opportunity would be given to allow an intermediate Court to place its final construction on the federal law involved, to the ouster of the prerogative of this Court.

It needs no citation of authorities to show that a statute is to be construed so as to give force and effect to every material word and clause. No part of it is to be slurred over to which, by ordinary intendment, a meaning can be given. Here is the word "entirely" thrown in to qualify a class of cases which are not appealable. By its insertion it makes two classes of cases, to wit: (1) cases dependent solely on citizenship; (2) cases dependent on citizenship and other grounds. Unless this self-evident meaning is given to it, it is eliminated from the statute, its common and obvious office is taken away, and a construction on some forced or technical ground must be given it, wholly different from that which any scholar familiar with the language would place upon the word, or the sentence as affected by the word.

If such be not the construction of the clause and of the word "entirely," what power is left to this Court to review and control the vast jurisdiction of this newly created Circuit Court of Appeals? Excepting cases specially certified and those of extraordinary character, where a *certiorari* will lie, it practically allows this new intermediate Court to act as a layer of non-conducting material between this tribunal and the *nisi prius* Courts, and says that once carried to the intermediate Court a case is beyond the supervision of this Court even where the construction of a United States statute or treaty is directly involved.

In *U. S. Express Co.* v. *Allen*, 39 Fed., 713, there was a motion to dismiss because there was "not such diverse citizenship as to give this (Circuit) Court jurisdiction." But the Court say:

"Diverse citizenship is one ground of jurisdiction in a federal Court, but not the sole ground, by any means. Controversies as to the constitution and laws of the United States are of federal judicial cognizance as well, and the question in this case arises out of this branch of the Court's jurisdiction, to which defendant's motion does not apply."

"Nor is it any objection that questions are involved which are not all of a federal character. If one of the latter exist, if there be a single such ingredient in the mass, it is sufficient. That element is decisive upon the subject of jurisdiction."

"It is the right and the duty of the national government to have its constitution and laws interpreted and applied by its own judicial tribunals. In cases arising under them, properly brought before it, this Court is the final arbiter." *The Mayor* v. *Cooper*, 6 Wall., 252.

It is not to be alleged in terms that the case is one which necessarily involves the construction of a United States statute, but it must appear, from the facts stated, that it does so arise. *Dowell* v. *Griswold*, 5 Saw., 39.

Jurisdictional facts must appear somewhere in the record. They need not necessarily be averred in the pleadings. *Railway Co.* v. *Ramsey*, 22 Wall., 326; *Briges* v. *Sherry*, 95 U. S., 401.

Case for Delay.

There is a final suggestion made in defendant in error's brief (page 39) that this writ was taken for delay only, and involving a point too frivolous for consideration, should, therefore, be dismissed. It is the extreme of sarcasm to say that in a case where it required a second instruction to the jury after their retirement, to prevent their finding in our favor, that the case is frivolous or fought only for delay.

The plaintiff's claim has been tested *abinitio*, because the inherent equities of the case were with the defendant, and its points of law, so far as decided, were with our position.

The quotation from the Mining Rights (brief, p. 42) is no more than an assertion of the general and admitted doctrine that a patent carries the right to follow the dip. Nowhere in the book is it said that such reservation exists in

favor of the patentee, who had no inchoate right by discovery at the time when our patent issued. On the contrary, the *Amador* and the *Spargo cases* are cited in that book with approval (p. 117).

In this case, one of the first, if not the first, to raise the very material question as to the appealability of a large class of cases, and argued as more or less a test case, it would hardly be satisfactory to counsel to have the material point avoided on the ground that there was not a *bona fide* controversy before the Court.

In conclusion we maintain, passing from the letter to the spirit and meaning of the act, that it was intended to reserve to this Court the right of final review on all federal questions where there was a possibility of contrary decisions between State and Federal Courts. No other construction is consistent with the theory of our judicial system, and the contrary construction would allow this new Court to decide otherwise than as this Court might direct without the power to review or to force that accord which is essential to every perfect judicial structure.

Suggestion of $1,000 Value not Involved.

In regard to the statement that no averment of $1,000 value to the matter in controversy appears in the record it may be true that aside from the averment of $250,000 damages in the complaint, no other allegation as to value appears. The controversy made value no part of the issue, and the value was so self-evident that we may have neglected to make formal averment or proof of it, and we therefore have tendered and ask leave to file affidavit of the general agent and superintendent of the defendant company, showing that the matter in controversy exceeds $1,000 besides costs. And as to the suggestion that this vacates the supersedeas, we see nothing in the authorities cited to maintain this point.

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